S232

Directorate of Distance Education

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B.G.L., First Year

Paper-3
ADMINISTRATIVE LAW

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Dear Student,

Change in the concept of state that is from police state to a welfare state gave more impetus to the functions of the Executive. Consequently administrative authorities necessarily have to perform more functions for the benefit and welfare of the society. These authorities some times may exceed their limitations. So, there should be some laws to regulate these authorities also. Administrative law is meant for regulating the administrative authorities. Because of the importance of this subject, it is also included in your syllabus .. The subject is divided into 10 units for your convenient study. The syllabus and scheme of lessons are given. In each lesson model questions are provided for your guidance. Read the lessons carefully. In addition to the lesson material you have got contact classes also. Please attend the classes regularly and interact with teachers on the subject.

Wish you Good Luck

Department of Law,

D.D.E.

Syllabus

Definition and growth of Administrative Law.

Doctrine of separation of powers and related doctrines

Delegated legislation and related principles

Administrative Discretion

Decision making power of Administration

Procedure for administrative decision making - rules of Natural Justice

Judicial control of Administrative actions - Public Law review

Private Law Review - Equitable Remedies

Liability of state : Ombudsman

Public Corporations

Reference Books :

1.	I.P. Massey	-	Aministrative Law
2.	V.G. Ramachandran	-	Aministrative Law
3.	Prof. Sathe	-	Aministrative Law
4.	Prof. K. Jayakumar	-	Aministrative Law
5.	M.P. Jain	-	Aministrative Law

SCHEME OF LESSONS

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UNIT – 1

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DEFINITION AND SCOPE OF ADMINISTRATIVE LAW

INTRODUCTION :

The most significant and outstanding development of the twentieth century is the rapid growth of administrative law. It does not, however, mean that there was no administrative law before this century. Since many years, in one form or the other, it has been very much in existence. But in this century, the Philosophy as to the role and function of the state has undergone a radical change. The governmental functions have multiplied by leaps and bounds. Today, the State is not merely a police state, exercising sovereign functions, but as a progressive democratic state, it seeks to ensure social security and social welfare for the common man. It regulates the industrial relations, exercises control over the production, manufacture and distribution of essential commodities, starts many enterprises, tries to achieve equality for all and ensures equal pay for equal work. It improves housing, looks after the health and morals of the people. Provides compulsory education to all children up to 14 years age and takes all steps which social justice demands. All these developments have widened the scope and ambit of administrative functions.

OBJECTIVES

- To understand the scope of and definition of Administrative Law.
- To analayse the definitions of Dicey, Griffith, Wade and Jennings.
- To understand the reasons for growth of Administrative Law.
- To know the differences between Constitutional Law and Administrative Law.
- To study the development of Administrative Law in England and in India.

UNIT STRUCTURE

1.1 Definition of Administrative Law
1.2 Nature and Scope
1.3 Reasons for the growth of Administrative Law
1.4 Constitutional Law and Administrative Law
1.5 Development of Administrative Law: In England and India
1.6 Summary
1.7 Key words
1.8 Answer to Check your Progress
1.9 Model Questions

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1.1 DEFINITION OF ADMINISTRATIVE LAW

Administrative Law is the law relating to the public administration. So far no jurist has fully succeeded in his attempt in defining administrative law, demarking articulately its nature, Scope and content. It is very difficult to precisely define the term administrative law. Administration today is burdened with so many functions which are not purely administrative. Administrative authorities today perform a complex of functions which includes legislative and judicial functions also. This complex situation makes delimitation of administrative action impossible. However, scholars like Prof. A.V.Dicey, Sir Ivor Jennings, Kenneth Calp Dewis and H.W.R. Wade, Griffith and Street, Garner gave their own definitions. Now let us see some of the important definitions which will be of much help in understanding the scope of administrative law.

1.1.1 A.V. DICEY :

Dicey has defined administrative law as "that portion of the legal system which defines the rights and liabilities of private individuals in their dealings with Public Officials". This definition of Dicey puts forth the following three principles. 1) It determines the legal status and liabilities of all officials. 2) It determines the rights and liabilities of private individuals in their dealings with Public Officials. 3) It specifies the proceature by which those rights and liabilities are enforced. Dicey's definition gives more importance to the relation of administration with the citizen and judicial remedies. Organization and functions which are considered to be important by Sir Ivor Jennings has not been mentioned by Prof. Dicey. Administrative Law should contain both aspects.

Now we are going to discuss the IVOR JENNINGS definition of Administrative Law. According to Jennings, "Administrative Law is the law relating to administration". Continuing further, he laid emphasis on the organization, powers and duties of administrative authorities. But administrative law cannot confine it self with this aspect alone. It has to deal with other functions of administrative authorities. It is silent about the remedies of citizens in case of administrative excesses. This definition does not mention the aspect of the relation of citizen with the administration in general.

Griffith and Street, the leading exponents of English administrative law, criticized this definition as being too wide. According to them Jennings has blurred the definition between Public Administration, Constitutional law and administrative law. But Jenning's definition is the most widely accepted definition of administrative law.

Check Your Progress Questions

1. Define administrative law?

1.1.2 GRIFFITH AND STREET

According to Griffith and Street, the main object of administrative law is the operation and control of administrative authorities. It must deal with the following three aspects.

(1) What sort of power does the administration exercise ?

(2) What are the limits of those Powers ?

(3) What are the ways in which the Administration is kept within those limits?

According to the Indian Law Institute, the following two aspects must be added to have a complete idea of present day administrative law ;

(4) What are the Procedures followed by the administrative authorities?

(5) What are the remedies available to a person affected by administration?

1.1.3 K.C. DAVIS

Davis a leading American authority on administrative law defines it as the law concerning the powers and procedures of administrative agencies, including the law governing judicial review of administrative action.

This definition was criticized as it leaves out parliamentary control of delegated legislation, control with the administrative agencies and the discretionary functions of the administration.

A definition of administrative law incorporating all these and the criticism leveled against it may be formulated as follows; Administrative law is that branch of law which deals with the structure, powers and functions of the organs of administration, the limits of their powers, the methods and procedure followed by them in exercise of their powers the methods by which their powers are controlled and the legal remedies available to a person against administrative authorities when his right is infringed by their action.

1.2 NATURE AND SCOPE

Administrative law is concerned with the operation and control of administration, with emphasis on function rather than on structure. It deals with administrative process and its control. Due to various reasons, the administrative process has come to stay in all Progressive societies, particularly in a welfare state, where many schemes for the progress of society are prepared and administered by the government.

1.2.1 SCOPE

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From the above definitions and explanations, it is clear that administrative law deals with the following :

1. Administrative law is a branch of Public law, but it is not a branch of law like law of contract or law of property.

2. Administrative law deals with the relation of individual with officials.

3. It deals with the organization and powers of administrative and Quasi – administrative agencies, such as corporations, boards, universities etc.

4. It deals with the study of existing principles as well as principles to be developed and formulated.

5. Administrative law is mainly concerned with three important actions of the administration. They are

   a) rule making actions

   b) rule decision actions

   c) rule application actions.

6. It includes the study of procedure by which the official action is reached. It also deals with the procedure which the administrative agencies are bound to follow when they are taking a Judicial action.

7. Control mechanism is another important aspect of administrative law. That is the method by which the administrative agencies are kept within bounds and made effective in the service of individuals. It is otherwise called as Judicial review.

8. Liability of government for the tortuous and contractual wrongs committed by its servants and agents is another important aspect of administrative law.

The main function of administrative law is the control of the administration and keep the authorities with-in their limits, so that discretionary power may not become arbitrary power. In the modern onslaught of administration the individual is affected in many ways in the name of Public interest. The individual is in the weakest defensive position against the mighty power of the administration. It is therefore, an important function of the administrative law to ensure that government powers are

Check Your Progress Questions
2 What is the main function of Administrative law?

exercised according to law, on proper legal principles, and on good rules of reason and Justice, and not on the whems and fancies of the officers, and to see that the individual has adequate remedies when his rights are infringed by the administration. Giving a clear picture of the scope of administrative law is difficult because the areas of administrative law are ever increasing and consequently the scope is also ever expanding.

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1.3 REASONS FOR THE GROWTH OF THE ADMINISTRATIVE LAW

During the last hundred years, the activities of the government has been completely transformed. Originally the activities of state were confined to maintenance of defense, law and order and few other general matters. But the modern state has assumed the role of social welfare state. The change of governments Philosophy from the laissez faire to the social welfare state has inevitably led to a phenomenal growth of functions of administrative authorities which in turn gave way to the growth of administrative law. The state now takes care of the health, education, employment, production, control and distribution of essential commodities operation of public utility services like railways, transport, air lines etc. In fact this brought a change in the role of administration. To meet the requirements, administration has to be armed with legislative and judicial functions. Because the legislature could only afford to lay down broad policies while entrusting upon the executive to workout its details by making rules, regulations, orders and directions. Now let us see some other reasons for the growth of Administrative law.

(i) Change in the concept of government

(ii) Demand of the people.

(iii) Regulatory measures.

(iv) Evolution of socialistic pattern of society.

(v) Inadequacy of Judicial system.

(vi) Inadequacy of legislative process.

(vii) Scope for experimentation in administrative process.

(viii) Non- Technical character of administrative process.

(ix) Adoption of preventive measures.

(x) Policing of preventive measures.

(ix) Principles of good governance.

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Special mention may be made to the supreme court Judgment. viz., **Onkar lal Bajaj v. Union of India** (2003) 2 SCC 673

While by and large this case restates well established prepositions of administrative law, the highlight of the case is the statement by the court of he principles of good government. The court laid down the following principles of good governance.

The role model for governance and decision taken thereof should manifest equity, fair play and Justice. The cardinal principle of governance in a civilized society based on rule of law not only has to base on transparency but must create an impression that the decision – making was motivated on the consideration of probity. The government has to rise above the nexus of vested interests and nepotism and eschew window dressing. The act of governance has to withstand the test of judiciousness and impartiality and avoid arbitrary or capricious actions.

Therefore, the principle of governance has to be tested on the touchstone of justice, equity and fair play and if the decision is not based on justice, equity and fair play and has taken into consideration other matters, though on the face of it. The decision may look legitimate but as a matter of fact the reasons are not based on values but to achieve popular accolade, the decision cannot be allowed to operate.

There are thus numerous factors responsible for the growth of administration an administrative law which are all pervading features of government today. No list of reasons, however lengthy it may be, can be complete and exhaustive. Nevertheless, modern functional government is the main force behind the growth of administrative law and process.

1.4 CONSTITUTIONAL LAW AND ADMINISTRATIVE LAW :

While delimiting the subject a question is sometimes asked whether there is any distinction between constitutional law and administrative law. There are two schools of thought in this respect. According to first, there is no difference between the two, whereas according to the other school, there is difference between them.

1.4.1 No difference between Constitutional and Administrative Law:

According to the early writers there is no difference between constitutional law and administrative law. Till recently the subject of administrative law was dealt with and discussed in the books of constitutional law and no separate and independent treatment was given to it. In many definitions of administrative law it was included in constitutional law. **Therefore Keith observed** : It is logically impossible to

distinguish administrative law from constitutional law and all attempts to do so are artificial.

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1.4.2 Difference between Constitutional Law and Administrative Law:

Though in essence constitutional law does not differ from administrative law inasmuch as both are concerned with functions of government, both are a past of public law in the modern state. There is, however, a distinction between the two. According to Holland, the Constitutional law describes the various organs of government at rest, while administrative law describes them in motion.

According to this view the structure of legislative and executive comes within the sphere of constitutional law while their functioning comes under the purview of administrative law.

Maitland, however is not a supporter of this view, for in that case powers and prerogatives would be relegated to administrative law. Maitland's view is that while constitutional law deals with structure and the broader rules. Which regulate the functions, the details of the functions are left to administrative law.

1.4.3 Dividing Line between Constitutional Law and Administrative Law :

According to Benjafield and Whitmore, the dividing line between Constitutional law and Administrative law is a matter of convenience because every student of administrative law has to study the Constitutional Law.

1.5 Different Position in the Countries of written Constitution :

In the countries which have written Constitutions like India, the distinction between Constitutional law and administrative law is not so much blurred as in England. In such countries Constitution is the source of Constitutional Law while Constitution, statutes, statutory instruments, Precedents and customs may be the sources of administrative law. Administrative law has become more articulate and definite as a system in democratic countries which have written Constitution. It has come to be recognized as a branch of public law by itself district and separate from Constitutional law.

1.6.1 Development of Administrative Law in England

The basic purpose of administrative law is to ensure proper exercise of powers by the authorities. It is said that the administrative law originated in England after the revolution of 1688. From England it spread to United States and other colonies. But English people does not recognize the separate existence of Administrative law

Check Your Progress Questions

3 Point out differences between Administrative Law and Constitutional Law?

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and they have not identified it from private law. Prof.A.V.Dicey in 1885 denied the very existence of administrative law in England. But Maitland during 1887-88 stated that half of the cases decided by the Queen's Bench. Division involved rules of Administrative law. Moreover large number of administrative tribunals existed in England during Dicey's period itself. However after 30 years Dicey slightly changed his view and recognized its existence. But he said that there is no true administrative law in England. Dicey's denial of administrative law in England is based on his feeling that administrative law is opposed to his concept of Rule law. Apart from that, by administrative law he meant French system of administrative law (Droit Administratif). Dicey's objections could not withstand the growth of administrative law in England. Dr.F.J.Port in 1929 published the first book on administrative law. In the same year Lord Chief Justice Hewart severely criticized the growth of administrative power in his book ; New Despotism. So the British government appointed a committee in 1929. The committee is known as Committee on Ministers Powers or Donoughmore committee. The main points for consideration were delegated legislation and wide discretion, that is conferred on the civil Service. The committee submitted its report in 1932. The committee pointed out the main defects of administrative law as it existed in England. Based on the recommendations of the committee, a select committee on statutory instruments was established in House of Commons in 1946 and Statutory Instruments Act was passed in 1945. The concept that "King can do no wrong" is diluted by passing the Crown Proceedings Act in 1947. Franks Committee was appointed in 1955 for considering and recommending the constitution and working of tribunals and enquires. The recommendations of the committee were accepted and that gave way to the Tribunals and Enquiries Act, 1956, now consolidated in the Tribunals and Inquiries Act, 1971. A non-official body known as Justice published a report entitled citizen and the Administration in 1961 concerning citizen's grievances against misuse of administrative powers. The establishment of the institution of parliamentary commissioner is the result of that report.(Parliamentary Commissioner Act, 1967). Today in England Administrative law is concerned with much wider aspect of administration.

1.6.2 Development of Administrative Law in India

Since the subject Administrative law itself is the result of modern welfare state, we cannot expect much from the ancient literature. One thing we can note during the rule by the King is that rules are made alike for the ruler and ruled. The King always used to abide by the law.

During the early period of British-regime, government is more concerned with its own existence rather that with welfare measures. But during the second-half of the 19th century and first half of the 20th century some steps were taken to regulate public safety, health and morality through different enactments. Some of those enactments which are passed during that period are, Indian explosive Act, 1884, Indian Petroleum Act, 1899, Opium Act, 1934, Dangerous Drugs Act, 1930, etc. These required governmental regulation which gave way to the development of administrative principles. These developments in the field of administration attracted the attention of certain authors and writers too. S.R.Narendranath Ghose and Chandrasekharan published their book on administrative law.

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Defence of India Act, 1939 conferred wide powers on the central government to make rules for the defence, public safety, maintenance of public order etc., Under this skeleton legislation Defence of India rules were framed. These rules conferred wide powers on the central government to interfere with life, liberty and property of the subjects.

After independence government assumed the responsibility of creating a welfare state. The Preamble to the Constitution lays down the basic objectives. The Constitution aims at establishing a sovereign democratic republic so as to secure to all its citizens social, economic and political justice; liberty of thought expression, belief faith and worship; equality of status and of opportunity and to promote among them all fraternity assuring the dignity of the individual and the unity of the nation. To achieve these objectives government departments have to be vested with extensive functions. To carryout these functions wide powers and discretion have to be conferred on the officials. A number of public corporations have been created. For deciding disputes tribunals have been established. All these increased areas of governmental action, regulation and control gave new impetus to the study of Administrative law.

Under Arts. 32 and 226, the Supreme Court and the various High Courts have been invested with powers to issue writs of Certiorari, Mandamus, Quo warranto, prohibition, and habeas corpus to check the excess of the government and the administrative agencies.

Further, the Constitution itself provides for the establishment of some administrative agencies to regulate a particular field i.e., Art 263, creation of Inter-state Council, Art.280, Finance Commission, Art 202, Inter-State water Dispute Authority - Art.315, Public Service Commission of India and Art, 329, Election Commission.

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Today in India, the administrative process has grown so much that we are infact not governed by administered. The unprecedented growth of Administrative process which is inevitable in a welfare-state and the necessity to safeguard the constitutionally protected rights of the citizen against the possible interference by the administrative authorities necessitated certain Universities in India to study this administrative law as a discipline. Now most of the Universities are having this particular branch of law as a subject of study.

Administrative Law was till recently considered as a part of Constitutional Law. Though Administrative law has become a separate independent subject, yet there are wide areas which are of common interest to both constitutional law and administrative law. Both are concerned with the functions of the government and both considered as branches of public law.

Now, to point out the differences between Administrative law and Constitutional Law, we have to consider the views of different scholars. First let us consider Holland's view. According to him the constitutional law describes the various organs of the government at rest, while administrative law describes them in motion.

The other difference is, administrative law deals with the organization, functions, powers and duties of administrative authorities, while Constitutional law deals with the general principles relating to organization and powers of the various organs of the state and their mutual relationships. Further, Constitutional law deals with the relationship of these organs with the individuals also.

Yet, another difference is constitutional law emphasizes individual rights, while administrative law is concerned soley with the administrative act of either the administrator or of quasi- judicial bodies.

Though there are differences between these two subjects, still they are running together in some areas viz., Articles 32, 136,226,300 and 311. Also, various administrative agencies are provided in the constitution itself i.e. Inter-state council (Art.263). Finance Commission(Art 280) Inter-state water Dispute Authority (Art 202) Public Service Commission (Art.315) and Election Commission (Art.329).

But the distinction between these two subjects, is not more relevant, because in recent years Administrative law has been developing as an independent subject capable of standing on its own legs.

1.7 SUMMARY

Administrative Law is the law relating to the Public Administration. It is very difficult to precisely define the term administrative law. Dicey has defined

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Administrative law as that portion of the legal system. Which define the right and liabilities of private individuals. In the dealings with public officials. It is main object is to control and regulate the administrative authorities and it deals with study of existing principles as well as principle to be developed and formulated. There are many reasons for the growth of administration law. Eg.:

1) Change in concept of government
2) Demand of the people
3) Regulatory measures.

We have all seen difference between Constitutional law and Administrative law. According to Holland the Constitutional law describes the various organs of government, at rest, while Administrative law describes them in motion. Finally in India distinction between Constitutional law and Administrative law. If not so much blurred as in England.

1.8 KEY WORDS

Articulately	-	Intelligive
Proceature	-	Conduct (the approved legal Procedure of the day)
Onslaught	-	Violent attack
Laissez faire	-	Commercial activity of Individuals with out Governmental control
Cardinal	-	Most important

1.9 ANSWERS TO CHECK YOUR PROGRESS QUESTIONS

For Question No.1 ... Refer Section No. **1.1**

Question No.2 ... Refer Section No. **1.2.1**

Question No.3 ... Refer Section No. **1.4.2**

1.10 MODEL QUESTIONS

A. Short Answer Questions

1. Explain Nature and scope of Administrative Law?
2. Define Administrative Law?
3. Difference Administrative Law and Constitutional Law?
4. Stage the reasons for the rapid growth of Administrative law?

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B. Long Answer Questions

1. "Administrative Law is related to Administration"- determining organizations power and duties of Administrative authority. Discuss?
2. "It is difficult to evolve a satisfactory definition of Administrative Law. There are many formulation in the field" – explain?
3. What is Administrative Law, mention the importance of study of Administrative Law?
4. "Administrative Law is part of Constitutional law it has become an independent branch of study only recently" – Discuss.
5. Define administrative law and distinguish it from Constitutional law?
6. Define Administrative law and discuss its nature and scope?
7. Trace the growth of Administrative Law in England and India?

UNIT – 2

THE DOCTRINE OF SEPARATION OF POWERS

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INTRODUCTION

The theory of separation of powers as propounded by Montesquieu had tremendous impact on the growth of administrate the Law and functioning of governments. It attracted English and American jurists as well as politicians. Writing in 1765, Blackstone had observed that if the legislative, the executive and judicial functions were given to one man, there was an end of personal liberty. According to Madison : "the accumulation of all powers, legislative, executive and judicial, is the same hands, whether of one, a few or Many and whether hereditary, self-appointed or elective may justify be pronounced the very definition of tyranny. The doctrine had influenced the makers of constitution in the Makers of Constitutions. Thus, the constituent Assembly of France had announced in 1789 that there would be nothing like a constitution in the country where the theory of separation of powers was not accepted. This doctrine in America is the base of the whole structure of the constitution. In this way it exercised a decisive influence in the minds of framers of the constitution of United State.

In India, the constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of government have been sufficietly differentiated and consequently it can very well be said that our constitution does not contemplate assumption, by one organ or part of the state, of functions that essentially belong to another **Ramjawaya v. State of Punjab** now as discuss the scope of the doctrine elaborately in few unit.

OBJECTIVES :

- ❖ To understand the meaning of the Doctrine of separation of powers.
- ❖ To Analayse the Historical Background of this theory.
- ❖ To discuss the Montesquie's theory.
- ❖ To discuss the criticism of this theory.
- ❖ To study the Doctrine of separation of powers in practice.
    1) Britain
    2) U.S.A.
    3) India

Check Your Progress Questions

3. Examine the doctrine of separation of powers with reference to Ram Jawaya V. state Punjab

(Space for Hints)

- To understand the meaning of Rule of Law.
- To Analayse the concept of Rule of Law according to Dicey and Sir Ivor Jennings,
- To study the Droit Administratiff

UNIT STRUCTURE

2.1 Meaning of separation of powers
2.2 Historical Background
2.3 Montesquie's Theory
2.4 Criticism
2.5 Doctrine of separation of powers in practice.
i) Britain
ii) U.S.A
iii) India
2.6 Rule of law
2.7 Droit Administratiff
2.8 Indian position
2.9 Summary
2.10 Keywords
2.11 Answer to Check your progress
2.12 Model question.

2.1 MEANING

It is generally accepted that there are three main categories of governmental functions - (i) the legislative (ii) the executive, and (iii) the judicial.

At the same time, there are three main organs of the government in a state. – i) the legislative, (ii) the executive, and (iii) the judiciary. According to the theory of separation of powers, these three powers are functions of the government must, in a free democracy, always be kept separate and be exercised by separate organs of the government. Thus (1) The legislature cannot exercise executive or judicial powers; (2) The executive cannot exercise legislative or judicial powers and (3) The judiciary cannot exercise legislative or executive power of the government.

2.2 HISTORICAL BACKGROUND :-

Check Your Progress Questions
1. What is meant by "separation of powers"?

Aristotle divided, for the first time governmental powers. Thereafter, the French writer Bodin (1576) spoke of it in his Re-Public. He said that some separation was essential. He maintained that the prince ought not to administer justice in person

but leave it to independent judges. Montesquieu in his (spirit of laws) book "Esprit des lois" published in the year 1748 clearly formulated for the first time, the modern doctrine of separation of powers. He said when the legislative and executive powers are united in the same person, or in the same body of Magistrates there can be no liberty. Because apprehension may arise that the monarch may enact tyrannical laws and execute them in a tyrannical manner. Blackstone also spoke in similar terms.

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Finally, to cite an American federalist (1783); the accumulation of all powers, legislative, executive and judicial in the same hand, whether of one, a few or many and whether hereditary self appointed or elective, may justify be pronounced as the very definition of tyranny. Where the whole power of one department is exercised by the same hands, which possessed the whole power of another department the fundamental principles of free constitution are subverted.

2.3 MONTESQUIE'S THEORY

According to this theory, powers are of three kinds: legislative, executive, and the judicial and that each of these powers should be vested in a separate and distinct organ, for if all these powers, or any two of them, are united in the same organ or individual, there can be no liberty. If, for instance, legislative and executive powers unite, there is apprehension that the organ concerned may enact tyrannical laws and executive them in a tyrannical manner. Again, there can be no liberty it the judicial powers be not separated from the legislative and the executive. Where it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be in the legislator. Where it joined with the executive power, the judge might behave with violence and oppression.

There would be end of everything it the same man or the same body were to exercise those three powers, that of enacting laws, that of executing the public resolutions and of trying the causes of individuals.

2.4 CRITICISM:-

In theory the doctrine of separation of powers was very sound. However, in practice many detects surfaced when it was sought to be applied in real life situations. The defects which were found in this doctrine when applied were mainly following:-

(i) Historical incongruity

(ii) Division of functions

(iii) Practical difficulties in its acceptance.

(iv) Adherence to it not possible in welfare state.

(i) Historical incongruity:-

Historically speaking, the theory was not correct. His exposition of this theory is based on the British constitution of tne first part of the 18th century as he understood it. In reality there was no separation of powers under the constitution of England. In British constitution, this doctrine was never adopted. Professor Ullman rightly says, "England was not classic home of the separation of powers." Similar is the observation of Donoughmore committee. "In British constitution there was no such thing as the absolute separation of the legislative, executive and judicial powers".

(ii) Divisions of functions:-

The assumption behind the doctrine of that the three functions of the government, namely, legislative, judicial and the executive are divisible from each other. As Friedman and Benjafield say, "The truth is that each of three functions of the government contains elements of the other two and that any rigid attempt to define and separate those functions must either fail or cause serious inefficiency in government.

(iii) Practical difficulties in its acceptance :-

It is difficult to take certain actions it this doctrine is accepted in its entirety. In practice it has not been found possible to concentrate powers of one kind in one organ only.

(iv) Adherence to it not possible in welfare state :-

The modern state is a welfare state and it has to solve many complex socio-politico-economic problems of a country. In this state of affairs it is not possible to stick to this doctrine. As Justice Frankfurter says : "Enforcement of rigid conception of separation of powers would make modern government impossible".

Thus, the position is that the doctrine of separation of powers in the strict sense is undesirable and impracticable. Therefore it is not fully accepted in any country of the world.

2.5 DOCTRINE OF SEPARATION OF POWERS IN PRACTICE:-

2.5.1 Britain :-

In Britain, the executive forms and integral part of the legislature. The cabinet considered as the first legislative chamber. It is chosen from the legislature. Ministers take part in the proceedings of the House and initiate laws. The cabinet has powers to advice the dissolution of the House of common. Before its normal term of five

years is over. The cabinet can advice the creation of powers to the House of Lords. The parliament has power, by refusal of supply and other methods to terminate the term of the cabinet. The executive appoints the judges. The executive can present an address to the crown for removal of judges. The house of lords is also the final court of appeal. The lord Chancellor presides over the Houses of Lords sittings in both its legislature and judicial capacities. The law lords also take part in the legislature business of the House. Each House of parliament has the powers of High court or parliament enforcing its own privileges and punishing those offending against them.

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Thus, in England there is no separation of powers in the strict sense. Parliamentary supremacy involves ultimate control of the executive. Parliamentary form of Government necessitates the parliament to trust the government, to give and accept the directions of the cabinet in regard to the legislative programme. Practical necessity again demands a large measure of delegation of powers to make rule, regulations and orders to the executive. According to strict construction of law, the king can veto a Bill passed by both Houses, although this powers has never been exercised. Besides, administrative authorities pass final orders from which there is no appeal to court.

2.5.2 The U.S.A:

The principle of separation of powers is impliedly adopted by the federal constitution.

1. All legislative powers shall be vested in Congress of the U.S. (Art.1)
2. The executive powers shall be vested in a president of the U.S. (Art.2).
3. The judicial power shall be vested in one supreme court and such other inferior courts as the congress shall ordain and establish (Art.3)

The Constitution of Massachusetts (1780) explicitly adopted the doctrine of separation of powers.

The congress is elected for a fixed term by the people. The president is indirectly elected by an electoral college. The president or his minister cannot initiate laws. The congress cannot be dissolved before the completion of its term by the president. Independence of the judiciary is preserved from executive interference.

However, one can notice many points of contact even in the American constitution. The president sends messages to the congress. He has a suspensive veto on bills passed by the congress. His ministers appear before the committees of the congress. For the appointments made and treaties entered into by the president,

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the approval of the senate is necessary. The lower House may impeach the president before the senate. The president appoints judges and has the power to grant pardon. Judges sit in judgement sit in judgement over the conduct of public officers and declare laws as unconstitutional. The framers realized that a complete separation was not possible. Therefore, they provided a system "checks and balances".

The powers of the house is balanced against that of the other. The power of the congress is limited by the presidential veto. The congress can override the veto by two-thirds majority in both the Houses. The powers of the president to make appointments and enter into entry is controlled by the senate's approval. However, the president can make appointments and enter into entry is controlled by the senate's approval. However, the president can make process appointments and executive agreements.

The congress can only make the formal declaration of war; whereas in his capacity as the commoner in-chief the president may commit acts of war and compel the congress to declare the war. It is for the congress decide the number of judges and fix their salaries.

2.5.3 India :

The position in India in that the doctrine of separation of powers has not been accorded a constitutional status. In the Delhi laws references case the supreme court also held that the doctrine has no application to the Indian constitution. Article 53(1) of the constitution vests the executive power on the president of India. But the constitution does not similarly vest the legislative or judicial powers. Besides, the constitution adopts the parliamentary form of government, the main feature of which is the close union between the executive and the legislature.

The High court under Art. 227 exercises some administrative functions while discharging its supervisory functions over subordinate courts and tribunals. The supreme court and high courts have certain (legislative) rule making powers. The president and governors have ordinance making powers.

It is not possible to divide the government powers in three watertight compartments. Therefore, a complete separation is neither possible nor practicable. It is the application of division of labour to constitutional law which helps to have specialisation and efficiency. It also helps to protect liberty. Both are essential for the efficient functioning of government.

2.6 RULE OF LAW

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Rule of Law is the coinage of Dicey, he gives the following three meanings to this concept.

(1) Absolute supremacy of ordinary law and the absence of special privilege. No man is punishable expect for a distance breach of the law as administered by ordinary courts of the land. It also signifies the absence of wide discretionary authority.

(2) Equality before law: the signifies not only that all are equal in the eye of law, but also that all are, whether high or low, bound to equal subjection of the law. This is to say that there is no exemption of public officials from duty of obedience to the law.

(3) The general principal of the constitution are the result of judicial decision of cases dealing with the rights of individuals. Dicey maintained that the judicial system of Great Britain is founded on the basic principle of rule of law.

Sir Ivor Jennings has criticized all the three propositions of Dicey. As to the first meaning he said that there is exercise of wide discretionary authority, the attitude of English courts towards administrative action has been different. As to the second meaning, teaching said that Dicey did not mean that the rights and privileges enjoyed by private individuals and public officials are the same.

Regarding the third point, Jennings said that Dicey was simply emphasizing the individualistic theory of 19th century which considered laws as rules protecting the rights of individual from undue interference by administrative authorities. Therefore, Jennings holds that Dicey's rule of law was simply the redefinition of a political doctrine but not a Judicial theory. That doctrine ceased to be valid when the philosophy of state underwent changes in England. That is a charge from police state to service state.

Dicey's rule of law does not obtain in England it existed once with full of limitations (1) Even after the passing of the crown proceedings Act, 1974, the evil of the common law maxim. "The King can do no wrong" are not completely rectified. (2) By the increase in governmental activity certain departmental heads are given judicial powers. (3) In England government servants hold office during the pleasure of the crown and there is no remedy for wrongful dismissal (4) Finally, diplomatic

Check Your Progress Questions

4 Explain the concept of Rule of law

(Space for Hints)

immunity also offends the principle of rule of law. Therefore the law has undergone serious modifications with the change of philosophy of state from individualism to collectivism.

2.7 DROIT ADMINISTRATIFF :

This is the French expression and its English equivalent may be administrative law. Droit Administratiff is the basic principle on which the French judicial system is structured. This signifies two parallel branches of law and courts; the one to decide disputes (whether civil or criminal) among the ordinary private individuals. The other is to decide disputes between the ordinary individuals and government or government officials, or disputes between public officers.

The French judicial system is based on Roman law to which state is an end is itself. Unlike India and the U.S, the French judiciary derives its powers not from the constitution but from the ordinary law. Therefore the judiciary forms a special branch of the civil service.

In France there is a hierarchy of ordinary courts administering ordinary civil and criminal law. In every 'commune' there is one local court presided over by the justice of peace. Then, there is the court of first instance with same appellate powers. There are 27 court of Appeal exercising appellate powers in civil and criminal cases. Besides; there are periodical courts known as the court of Assizes. The Supreme Court of appeal in France is known as the court of cassation.

The council like the American supreme court protects the rights of individuals by grating redress against encroachment by public authorities. Fees is minimum, formalities are simple, and the procedure is speedy. This can annual any law of a subordinate law making body any administrative decree or ordinance. Matters relating to conflicts of jurisdiction are decided by the council and that is final.

According to the trend legal system public officials are entitled to a special privilege. Accordingly for any action against them in their official capacity. They are governed by a special body of law and answerable only to a special system of courts. Individual liberty is better secured under the French system. It is only after realizing the advantages of this system traditional rule of countries are also adopting the principles of the French system.

Check Your Progress Questions
5. Explain "Droit Administratiff" of France

2.8 INDIAN POSITION:

The basic principles of rule of law are incorporated in the preamble of our constitution which seeks to achieve equality in all aspects of life. Part III of the

constitution guarantees certain fundamental freedom including right of life (Art. 21) and right to equality (Art.14) for violation of the fundamental rights in part III constitutional remedy by means of write is provided under Articles 32 and also 226. The supreme court, is more (or) less in the position of protector of these rights against any threat or violation by state action. In the recent times the supreme courts has been commendably discharging its duty of safeguarding the basic rights from any arbitrary action.

Today rule of law is regarded as a mark of any free society and identified with liberty. But its content may vary from state to state.

One great service rendered by Dicey through his doctrine of rule of law is that it serves as a caution that administration must confirm to rules and its violation is subject to judicial review.

2.9 SUMMARY :

French jurist Montesquieu was the founder of this theory. He formulated this in his famous book "The spirit of laws" published in 1748. According to this traditional constitutional theory there are three different types of power in every government. They are

(1) Legislative power
(2) Executive power
(3) Judicial Power According to him this theory means:

The government must be divided into three different organs. One organ of the government should not exercise the functions of the other two organs. The main purpose of distributing the power between different organs is to avoid the concentration of power is a single person (or) body of persons and another object is to avoid (or) atleast minimise the arbitrariness in the government functions and theory human liberty can be protected.

The defects which were found in this doctrine when applied were mainly the following.

(1) Historical in congruity
(2) Divisions of function
(3) Pratical diffieulties in its acceptance
(4) Adherence to it not possible in welfare state.

Because of these reasons this theory which is not fully accepted is any country of the world.

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Check Your Progress Questions

2 Who is the founder of this theory?

(Space for Hints)

American position : The principle of separation of powers is impliedly adopted by the federal constitution.

Britain position : There is no separation of powers in the strict sense.

Position in India : The doctrine of separation of powers is not fully accepted in the Indian constitution. It is mainly because of the practical necessities in administrating the modern day complex government.

We have also seen rule of law. The term rule of law was first coined by Chief Justice of England Sir Edward Coke. In a battle against the King, he maintained successfully that the king should be under God and the Law, and he established the supremacy of the law against the executive. Finally we discussed Droit Administratiff. According to Dicey's view that though Droit Administratiff a preferential treatment was given to the government.

2.10 KEY WORDS

Tremendous	-	Dreadful
Hereditary	-	Descending by inheritance (or) from parents to children.
Tyranny	-	Cruel government
Ought	-	To be bound in duty
Liberty	-	Freedom
Subvert	-	Overthrow

2.11 ANSWERS FOR CHECK YOUR PROGRESS QUESTIONS

Question No.1	...	Refer **2.1**
Question No.2	...	Refer **2.9**
Question No.3	...	Refer Introduction
Question No.4	...	Refer **2.6**
Question No.5	...	Refer **2.7**

2.12 MODEL QUESTIONS

A) Short Answer Questions

1. Doctrine of separation of powers write short notes
2. How far the Doctrine of Separation of powers is applicable to the constitutional law of India.
3. What is meant by Rule of Law according to Prof. Dicey?

B) Long Answer Questions

(Space for Hints)

1) Explain the doctrine of separation of powers Discuss how far the doctrine of powers is incorporated under the constit ıtions of India and U.S.A.

2) Explain the theory of Rule of law critically examine the views of Prof .Dicey on rule of law.

3) Explain "Droit Administratiff" of France. How does it differ from the rule of law?

(Space for Hints)

UNIT - 3

DELEGATED LEGISLATION AND RELATED PRINCIPLES

INRODUCTION

Among the sources of law, legislation is of great importance. It may be termed as supreme law of the land. The expression "legislation" is derived from two Latin words; legis and Latin, which means 'Law' and 'to make' respectively. It means, "Law making power". The law making body/authority is called Legislature or Legislative authority". Salmond has classified the Legislation into two heads namely: 1) supreme Legislation (i.e. the Legislation passed directly by the sovereign / supreme Legislature. In India, parliament is the supreme Legislature); and ii) subordinate Legislation (i.e Legislation passed under the power authority delegated to the Executive or Administrative authority by the supreme Legislature). Supreme Legislation is the Legislation made by the supreme power is the state. Subordinate Legislation is the Legislation made by the authority other than the supreme authority in the state in the exercise of the power of delegated to it by the supreme authority. The subordinate Legislation is dependent on some superior or supreme authority for its continued existence and validity.

OBJECTIVES

- To understand the meaning and definition of delegated legislation.
- To analayse the causes for the growth of delegated legislation.
- To study the development of delegated legislation in Britain, U.S.A and India.
- To know the Essential legislative functions.
- To discuss the methods of legislation.
- To study the New Despotism Dnol the Donoughmore committee.
- To understand the concept of Delegation of Taxing power
- To study the mode of control of delegated legislation?
- To discuss the substantive ultra vires and procedural ultra vires

UNIT STRUCTURE

3.1 Meaning and Definition of delegated legislation.

3.2 Causes for the growth delegated legislation.

3.3 Delegated legislation in Britain

3.4 Delegated legislation in U.S.A.

3.5 Delegated legislation in India
3.6 Essential legislative Function
3.7 Methods of delegation
3.8 Henry VIII clause type
3.9 The New Despotism
3.10 The Donoughmore committee
3.11 Delegation of taxing power
3.12 Control of Delegated legislation
(A) Parliamentary control
(B) Judicial control
(C) Procedural control
3.13 The Doctrine of Ultravires
(1) Substantive ultravires
(2) Procedural ultravires
3.14 Summary
3.15 Keywords
3.16 Answers to check your progress
3.17 Model questions.

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3.1 MEANING AND DEFINITION OF DELEGATED LEGISLATION

3.1.1 Meaning :-

The expression 'Delegation of Authority (or) Delegated Authority' means "transfer of authority / power by the superior to the subordinate". Accordingly, when a subordinate by virtue of delegated authority passed a law / legislation, it is called "delegated legislation". Delegated legislation is also known as a 'subordinate legislation or 'Administrative legislation'. It means "conferring one's power of law making to another". It is the extension of law making power to the executive by the legislature.

E.g:- In India, the legislative authority (law making body) is parliament. It is not possible for the parliament to pass laws at all times in all cases. Hence, it may delegate the making power to the executive or Administrative Authorities.

3.1.2 Definition :

It is very difficult to give any precise definition of the expression 'delegated legislation'. It is equally difficult to state with certainty the scope of such delegated legislation. Mukherjea J. rightly says:

Check Your Progress Questions

1 What is delegated legislation?

(Space for Hints)

"Delegated legislation is an expression which covers a multitude of confusion. It is an excuse for the legislators, a shield for the administrators and a provocation to the constitutional jurists..."

The simple meaning of the expression 'delegated legislation' may be given as "when the definition of legislation is entrusted to organs other than the legislature by the legislature itself, the legislation made by such organs is called delegated legislation."

3.2 CAUSES FOR THE GROWTH OF DELEGATED LEGISLATION:-

Though the traditional constitutional theory of separation of powers was against delegation of legislation power to the executive, the adoption of the new philosophy of social welfare state some other factors have compelled the legislature to delegate law making power to the executive. The 'committee on ministers', powers which analysed the whole problem of delegated legislation in England enumerated the following factors as the reason for the growth of delegated legislation. The same factors may be cited as the reasons for the growth of delegated legislation in India also.

3.2.1 Pressure upon parliamentary time:

Due to the increase of the state's functions and responsibilities the administration of the country has become difficult hence, the legislative activity has also increased. The state requires rules and other minor details of the law for the effective administration of the country. But the legislature has no time to discuss all these matters in detail and to give the quantity and quality of law which is required for the effective functioning of the modern state. Hence the legislature was compelled to delegate part of its law making function to the executive.

3.2.2 Technically:

Sometimes the subject matter of the legislation is of technical nature and it requires handling by the experts. In such cases, it become necessary to delegate to appropriate authority the power to deal with such subject matters.

3.2.3 Flexibility :

Check Your Progress Questions

3 What are the reasons for the growth of delegated legislation?

It is very easy to make changes in the delegated legislation whereas making changes (amendment) is a statute involves a lengthy procedure. Because of this advantage, the subjects where the law is to be changed more frequently to meet the changing needs of the society delegated legislation is preferred.

3.2.4 Emergency situation:

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Sometimes the economic and national emergencies require quick action but because of being overburdened, the legislature finds it very difficult to act as promptly as the situation demands. Hence, the executive delegates the power to make rules, regulation, etc. to deal with such situation.

3.2.5 Secrecy

In some cases the public interest demands that the provisions of the law should not be known until the time fixed their operation comes, e.g. imposition of duty or exchange control, rationing scheme, etc, this also necessitates the delegation of power to make rules, regulations, by-laws, etc. to the executive or other agency.

3.3 DELEGATED LEGISLATION IN BRITISH:-

The British parliament is supreme. It can either directly legislate or delegate such powers to subordinate agencies. In practice the parliament only lays down the broad policy of the laws and the rest of the thing are added by subordinate agencies in the course of implementation.

3.4 DELEGATED LEGISLATION IN U.S.A :-

you know that the U.S constitution is based on the principle of separation of powers. But in practice major part of the law emerge by means of rules and regulations framed by the administrative authorities. This is justified on the ground that what is delegated by the congress is not legislative. Power but administrative power. But, you must remember, that the congress which is having the legislative authority cannot delegate administrative power to a subordinate authority.

3.5 DELEGATED LEGISLATION IN INDIA:-

In India there is no specific provision in the constitution prohibiting or permitting delegation of legislative authority. Article 13 brings within the fold of 'Law' any rule, regulation, order, notification or by-law. At the same time doctrine of separation of powers is not applicable to the Indian constitution. The power to make law is entrusted to the wisdom of the legislature in trust that it will not abdicate the function or try to substitute the wisdom of any other body in its place. The supreme court in Delhi law Reference case held that the parliament shall not delegate its essential functions.

Check Your Progress Questions

2. How far delegation of legislature power is permissible in India?

3.6 ESSENTIAL LEGISLATIVE FUNCTION:

To very difficult to define the term 'essential legislative Function Unless it is defined in precise term it is very difficult to draw a line of limit on

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delegation of law making power to the executive. So for the supreme court has not laid down any formula to decide or generalise what is essential legislative function. But in individual cases it held certain functions as essential legislative function. In simple term it means framing of the policy and object of the Act. But it includes many more things. The following function have been held as essential legislative Functions by the judiciary in the different cases.

3.6.1 Laying the policy and object of the act:

Defining the policy and the object of an act is an essential legislative Function. Hence the act itself the policy and object must be defined and it can not be delegated to the executive to legislate on the matter to policy and object. Object will vary from Act to Act depending upon the subject matter for which the Act is passed.

3.6.2 Repeal of law

In re Delhi laws Act case as well as in **Makkan singh v. state of punjab** (Act 1964 sc 381) the supreme court held that the power to repeal a law is an essential legislative Function. Hence the legislature cannot delegate the powers to the executive to repeal a law. Repealing of law can be done only though a legislation.

3.6.3 Retrospective operation:

Retrospective operation means giving effect to a law from back date. The legislature in India has power to pass any law retrospectively subject to certain imitations contemplated in the constitution. Giving retrospective effect to an Act is an essential legislative Function hence it must be dealt with in the Act itself. Giving retrospective effect to an Act cannot be make through the device of delegates legislation. i.e. the power to decide weather the Act can be given retrospective effect cannot be delegated to executive.

3.6.4 Amendment

Amendment means making changes is the Act. It is an essential legislative function so it can be done only by the legislature and it cannot be delegated to the executive.

3.6.5 Modification:

Amendment and modification does not carry much difference between them. Power to modify an Act is also an essential legislative function. However, if the changes are not essential character delegation is permissible.

Check Your Progress Questions

5 What are the Essential legislative function?

3.6.6 Taxing:

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The power of levying tax is an essential legislative function. Hence a tax can be imposed only through a statute and not through delegated legislation. art 265 of the constitution expressly lays down this condition.

3.6.7 Ouster of Jurisdiction

Ouster of Jurisdiction means limiting or excluding the Jurisdiction of the courts. The power of excluding the Jurisdiction of the court is an essential legislative function. So it can be done only through a statute and it cannot be delegated to the executive.

3.6.8 Defining offences :

The making of a particular act to be an offence and prescribing punishment for it is essential legislative function and cannot be delegated to the executive.

3.6.9 Adopting Future Acts :

The executive can be empowered to adopt and apply existing laws is another states, but it cannot be empowered to adopt the laws which may be passed in future because it is an essential legislative function.

3.6.10 Compensation:

According to Act. 31(2) of the constitution (i) The principles on which the compensation is to be determined, and (ii) the manner in which the compensation is to be determined is respect of any property compulsory acquired for a public purpose, should be provided by the law. That means those functions are essential legislative functions and must be dealt by the legislature itself.

3.7 METHODS OF DELEGATION:

Expect that of essential legislative function, all others can be delegated. The legislature adopt different methods for delegation. They are detailed below.

3.7.1 Power to fill in details:

Because of lack of time legislature may be laid down the policies and details may be directed to be filled up by the executive. That is directing the executive to frame rules for the purpose of carrying out the purpose of the Act.

Check Your Progress Questions
4. What is conditional legislation?

3.7.2 Power to inclusion and exclusion:

Generally the kinds of goods or institutions to which Act applies will be mentioned in the schedule to the Act itself. Depending upon the circumstance deletion

(Space for Hints)

and addition has to be made to the schedule. When such power is conferred on the executive, it is called as power to include or exclude.

3.7.3 Power to modify the statute

Modification of a statute is to be done by the legislature. But in certain cases this power is given for the extending the Act to new areas. Good example of such delegate is Hentry VIII clause. In this type of delegation the legislation gives the power to the executive to make modification in Act to meet any difficulties. The committee on ministers powers criticized much wide delegation of legislative powers.

3.7.4 Power to bring an Act into operation:

Here law making power is not delegate to the executive. But the power to notify the date on which the Act has no come to power is delegated to the executive.

3.7.5 Power is extend the application of the Act:

In this kind of delegation the executive is given the power to apply an act which is in force some other territory, the territory which is under the administrative control of the executive. As a corollary, the power to make modification is also given to the executive.

3.7.6 Conditional Legislation :

A legislature may legislate conditionally when it enacts a law on condition that it shall come into force only on the happening of specified event or upon a particular area. In this case the subordinate body may be empowered to decide whether the particular event has happened or not.

3.7.8 Queen V. Burah is the leading case on this point. When the law comes out of the legislative chamber it is presumed to be full and final. Therefore it is maintained that there is no delegation of legislative authority is conditional legislation.

3.8. HENRY VIII CLAUSE TYPE :

There are different types of delegated legislation. One of the important type is Henry VIII clause type.

Henry VIII of England is known for his authority. He assumed all state powers and performed the functions either directly or through his delegates. Therefore, this type of delegation is named after him.

His reign sought to enforce his will by different means. The difficulties which he faced in the legislative field was solved by adopting this type of delegation

of legislative power. Under this he delegated power even to armed the parent Act passed by the parliament. You will find that this is delegation of essential legislative function to the executive.

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Therefore, the committee on ministers powers (England 1929) in its report has pointed out as follows : This is against the basic principle of Parliamentary democracy. This type of delegation crosses the permissible limit of delegation of legislative power. Therefore, this type of delegation should be re-sorted to only in exceptional cases when there is absolute necessity for a limited period. The committee also pointed out that this can be resorted to meet the difficulties arising from implementation of enactments.

This device now fell into disuse in England. In India, it is very rarely used. The repeated provisions (sections 120-R8) of the state Reorganization Act, 1956 may be cited as an illustration. Because Hentry VIII clause type of delegation goes beyond the permissible limit of delegation of legislative authority the courts in India have seriously viewed it and invalidated the same.

Object : The main object of the Hentry clause VII type of delegated legislation is to remove certain difficulties. King Hentry VIII succeeded in removing all difficulties in the enforcement of his will by resorting to or adopting this type of delegation.

E.G. National Insurance Act, 1911 in England.

The Hentry VIII values type of delegated legislation should be conferred on the executive only in exceptional cases to remove difficulties.

3.9. NEW DESPOTISM :

Lord Hewart, Lord Chancellor of England, published his book 'the New Despotism' in 1929. In his book he analysed in detail the growing tendency of delegated legislation in England. he was so much upset and expressed a strong resentment against conferring power to the executive to made rules and orders to modify even the provisions of the parent Act. He exposed the danger of the executive arrogating to itself vast legislative powers under the cover of delegated legislation and exercising those powers in such a way as to evade book parliamentary control and judicial scrutiny.

3.10 THE DONOUGHMORE COMMITTEE :

The Lord Hewart's book had a tremendous impact on public opinion and immediately the British parliament appointed the committee on minister's powers

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to enquire into mainly the subject of delegated legislation. This committee is known after its chairman as the Donoughmore committee one of the main work entrusted to the committee was to consider the adequacy of the existing modes of parliamentary control and to suggest new methods for an effective check by parliament on the powers delegated by it to the various administrative agencies.

The Committee came to the contusion that delegated legislation is a necessity in modern times but it must be kept under the ultimate control of Parliament. Among the various suggestions it made the following are worth noticing.

(1) The Prcecise limits of the delegated Power to the executive should be expressly defined in clear language in the statute (partent act).

(2) Hentry VIII clause type of delegation should be avoided as far possible. If it is resorted is unavoidable circumstances the operation of such clause must be limited to a very short period.

(3) Each House should setup a standing committee to scrutinize the delegated legislation. (Accepting this recommendation the committee on statutory Instruments was created in the House in 1944)

3.11 DELEGATION OF TAXING POWER:

Can the power of taxation be delegated? The simple answer is that if taxing power is essential function it cannot be delegated. The supreme court has held that taxing power is not an essential legislative function. Therefore it can be delegated. The supreme court also held that such delegation must prescribe guidelines. The power to impose tax is contained in art 265 of the constitution. It reads as follows. No tax shall be levied or collected expect according to procedure established by law. This provision states that imposition of tax must be according to law which means a valid law passed by a competent legislature last I and II contain items on which parliament and state legislature respectively can impose tax.

3.11.1 Delhi Municipal Corporation V. Birla cotton mills (1968)

In this case the supreme court upheld a provision which delegated power to levy electricity tax, without prescribing any limit to the corporation to impose tax. The local body is subject to government control.

The supreme court has also upheld similar delegation of taxing power to the Calcutta municipal Corporation in **Corporation of Calcutta V. liberty cinema** (1966).

In **Devi Das v. state of Punjab** 1967,

The supreme court held valid a provision which authorized the executive to levy sales tax between 1% to 2. But the court is the same case struck down as invalid another section which authorized the Government to levy sales tax "as it deems it".

J.R.G. Manufacturing Association V. Union of India (1970)

In this case the Supreme court held valid, delegation of power in favour of the Rubber Board, to levy and collect duty. The court observed that the board is a high powered body subject to the control of the Government. Besides, the policy of the law was made very clear with sufficient clarity.

Nagappa V. Iron ore mines cess commissioner (1973)

The supreme court held valid a provision of the Iron ore mines Labour welfare cess Act, 1958, this provision authorized the Government to levy and collect tax not exceeding 50 super metric tones of iron ore for the welfare of labour. On similar grounds the court upheld the validity of the provision of the impugned Act in **Ramarju V. state of A.P.** (1972)

Thus it is clear that power can be delegated if the policy of the law is clearly laid down in the enabling Act with sufficient guide lines.

Sub – delegation:

The question arises whether a delegate can further delegate. The general principal of law is contained in the maxim delegatus non protest delegare –a delegate cannot further delegate. In constitutional law, the American congress is taken as the delegate of the people. Therefore it shall not further delegate the legislative power. But you must know that this principle is not applicable to India. In India neither the parliament nor the state legislatures are taken as delegates of the people. But, they are deemed to be the creature of the constitution of India and they exercise their powers with in the limits of the Constitution.

3.12 CONTROL OF DELEGATED LEGISLATION:

We have already seen the advantages of delegated legislation. yet it has the evils of its own: most important is abuse of power. To overcome such abuse the following controls are exercised :

(a) Parliamentary control

(b) Judicial control

(c) Procedural control

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(Space for Hints)

a) Parliamentary control

The statute delegating the legislative authority to subordinate agencies may require the subordinate legislation to be placed before the parliament. The process is called the laying procedure. ("laying before parliament"). When the rules and regulations are placed before the parliament, it serves as a check on the working of the legislative power delegated.

The parent enactment which deals with such delegation and control mechanism may also prescribe a time limit with in which the rules framed must be placed before the parliament. The Act may also say that failure to place the same before the parliament may result in rejection of the rules framed.

In India there is a committee on subordinate legislation for each House. The lok sabha committee and the Rajya Sabha committee. Though the control exercised by these committee is indirect, it is an effective control on executive legislation.

It was thought that mere laying may not serve the purpose of necessary check. The busy parliament may not find sufficient time to scrutinise all the executive legislation.

The lok sabha committee is appointed by the speaker from among the members of the house for period of one year. It consists of 15 members of the opposite party and Deputy speaker.

The Rajya sabha committee also consists of 15 members. They are appointed for a period of one year. The chairman of the Rajya sabha will nominate the members from among various political parties. There is no restriction of ministers becoming members of the committee.

Each committee will scrutinise and report to the House as to whether the power delegated has been properly utilized. In addition to this, the committees may discharge specific functions also. To see whether the delegated legislation is an accordance with the objectives of the constitution and the parent Act; whether the delegated legislation contains any imposition of tax; whether the same excludes the jurisdiction of the court; whether the same is given retrospective operation ; whether there is any delay in its publication or the laying procedure etc. After the scrutiny the committee reports its findings to the House along with its suggestions, if any. If necessary for any procedural defects the remarks of the Government is also obtained. In this way the committee evolved a code of propositions and guidelines to be observed by the government in its rule making power.

Generally the committee has been against the imposition of tax by rule power; giving retrospective effect to the rules ; complicated language adopted thereby making the public difficult to understand the rules and exclusion of authority of court.

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In addition the role played by the committees the following techniques also serve as check on executive legislation ; (1) debate in the Houses, (2) questions and notices, (3) resolutions and motions (4) proposal and (5) private bills.

In India the parliamentary control is not very effective as in England. For, it works only as a normal constitutional function.

(b) Procedural control:

In India there is no separate law governing the procedural control. The parent Act would lay down the type of control observed. They may be either of the following, prior publicity, after publicity, or consultation of the effected.

Prior publication : Under this, the delegated legislation is first published in the draft from so as to give an opportunity to the people to express their opinions and suggestions. Publication is done in the Gazette and objections and suggestions are invited for the consideration of the rule making authority.

After publication : Even if the parent is silent it is necessary that the rule making authority must be publish the delegated legislation. so as to enable the public to know the law. This is done in the Gazette and news papers.

This is democratic process involved is delegated legislation. Now the law in India requires poor consultation of the affected interest. But occasionally some legislation have prescribed this control Mechanism.

Sometimes the enabling legislation may require consultation with a named body. The banking companies Act provides for prior constitution with the Reserve Bank of India before any delegated legislation under the Act is made. Whereas the Tea Board Act requires prior consultation of a statutory body, the tea board, before making any delegated legislation under the Act. The industrial employment. (standing order) Act, 1946, requires the effected interests to be consulted previous to the formulation of any delegated legislation. In this the affected persons get an opportunity to prepare the draft rules which will come into force after Government approval, safety rules in mines is an illustration to the point.

(c) Judicial control

Judicial controls the delegated legislation through the normal process of judicial review of administrative action. This review power cannot be controlled in

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any way. In state of Kerala V.K.M.C Abdullah and, the supreme court held that the validity of the rules can still be challenged ever in the face of phrase as "shall not be called in question in any court" is the enabling Act.

3.13 THE DOCTRINE OF ULTRAVIRES :

Judicial control of delegated legislation is based on the doctrine of ultra vires. It means beyond the powers. When either the enabling Act or delegated legislation is ultra vires of the constitution or when the delegated legislation is ultra vires of the enabling Act, it is a case of substantive ultra vires. When the challenge is made on accordance with the procedure prescribed by the enabling Act, it is a case of procedural ultra vires.

3.13.1 Substantive ultra vires:

(a) Enabling act is ultra vires of the constitution:

(A) Where the law which delegates legislature power is violative of the provisions of the constitution expressly or impliedly, the law is rendered unconstitutional and void. If any delegated legislation is made is exercise of such power the same is also rendered void.

Distribution of the legislative power is made by means of Article 246 and the three lists. List I deals with the parliamentary items; whereas list II deals with state items and list III deals with the concurrent items of the parliament and state legislature. The residue, if any, is left with the centre. If the state legislature passes a law based on any item in which only the parliament can legislate or the parliament passes a law on any item coming is List II, the law is unconstitutional.

A law which is within the legislative competence may be violative of the fundamental rights guaranteed in part III of the constitution. In that case the parent Act as well as the delegated legislation will be unconstitutional and void. The leading case of the point is **Chirtaman Raa v. state of M.P** (1951). In this case the parent Act empowered the subordinate agency to declare a particular season as agricultural season. The effect same was prohibition of manufacturing of beedies in the notified areas in that season. No worker should accept any work other than agricultural work during the agriculture season. This affected fundamental right under Article 19(1) (g) namely, trade or profession of Chirtrman Rao a beedi manufacturer who challenged the law . the act as well as the order was held unconstitutional and void.

Where the art delegating the authority has not laid down the policy of the law and formulated the same into a code of conduct. The same has gone beyond the

scope of conditions of delegated legislation (excessive delegation). So also if the delegation lacks guide lines, the same is hit by unreasonable delegation therefore rendered void.

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Hamsad Dawakhana V. Union of India (1960) :- the parent Act in this case conferred on the subordinate authority blanket power to include "any disease" which the supreme court held as unreasonable and excessive delegation without any guidelines.

(b) Sometimes the delegated legislation may fall beyond the constitutional limit though the Parent Act may be within the constitution, in such cases the delegated legislation will be declared unconstitutional and void. The Supreme court in **Narendra Kumar V. Union of India** (1960) held that the validity of the delegated legislation can be challenged even if the parent Act is valid.

(c) Finally, the delegated legislation itself may be ultra vires the parent Act. Under this the delegated legislation may be challenged as beyond the scope and power conferred by the parent Act, or that it conflicts with the delegating Act, directly or indirectly.

(i) When the subordinate authority has exceeded power conferred on it for purpose of making delegated legislation. The same is hit by the rule of ultra vires. **Ibrahim V.R.T.A** 1953, to a direct case on the point of making delegated legislation in excess of power delegated.

(ii) The delegated legislation may conflict with the object of the parent Act. This may be in direct indirect conflict with the enabling legislation.

Delhi Transport Undertaking V. Hajeary (1972)

In this case the parent Act provided that any person drawing a salary more than Rs. 350 per month has to be appointed by the General manager of the D.T.U. Another provision said that no person can be dismissed by authority. The subordinate to the appointing authority. The rules framed under the Act gave power to the General Manager to delegate all his power to the Assistant General Manager. The rule was struck down by the Supreme court since the rule was in conflict with the provisions of the parent Act. Sometimes the delicated legislation may have to under go the prescribed procedure as fixed by the parent act.

The rule making authority is expected to follow the procedure prescribed for making rules. The mines Act, 1962 made it obligatory on the part of the central Government to consult the mining Board before making any delegated legislation. certain rules framed without consulting the mining Board was challenged in

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Banwarial V. **Bihar** (1961). The Supreme court held that the rules so framed were hit by non-observance of the procedure prescribed.

Where the rules framed are unreasonable or male fide (of bad faith) the rules are open to challenge though unreasonable and the bad faith (ulterior motive) are difficult for proof.

3.13.2 Procedural ultravires :-

When the delegated legislation has not followed the procedural formalities prescribed by the enabling Act, it may amount to procedural ultra vires. The general procedural requirements. Include the following :-

1. Consultation with affected interests or an Expert body: This method of consultation with affected interests or an expert body occurs as a safeguard against arbitrariness. Helps to get the co-operation of the affected person in the implementation of the rules. It also provides room for de-moralization to delegate legislations. Consultation with affected interests has not been made a general requirement in India. In many statues where the requirement is prescribed it appears in the form of condition of "Previous Publication". Such publication helps the interested parties to bring in their views to the attention of the authority. Some statues provide for elaborate making procedure.

2. Publication : Delegated legislation has to be given sufficient publicity. In England, this publication has been made a general statutory duty by the Statutory Instruments Act, 1946. In India there is no general statutory provision requiring or regulating publication of delegated legislation. many status may require publication in the official Gazette. In such cases of failure to publish the rules in the prescribed manner would render the rules invalid. Thus in **Narendra Kumar V. Union of India,** when the rules made under the Essential commodities Act 1935 were not notified in this official gazetters as required under 5.3 of the Act, we rules were held to be not legally effective.

By publishing the delegated legislation, the general public is made award of the rules. So the aggrieved party cannot claim ignorance of these rules.

3. Laying before the legislature : Most of the statues which delegate law making power contain the requirement of laying. In England the technique of laying is very extremely used because all the administrative rule making is subject to the supervision of the parliament under the statutory Investment Act, 1946, In India there is no special law like the statutory Instruments Act, 1946 to regulate the technique of laying. Here the use of this technique made by making a stipulation in the enabling Act providing

that the rules and regulations made there under shall be laid on the table of the House. Laying In India takes various forms (a) laying with no further direction (b) laying subject to annulment or laying subject to negative resolution (c) laying subject to affirmative resolution (d) Laying in draft subject to negative resolution; and (e) Laying in draft subject to an affirmative resolution.

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3.14 SUMMARY :

Delegated legislation is otherwise called as sub-ordinate legislation. modern writers refer it as administrative legislation. according to the traditional constitutional theory of separation of powers legislature is the primary body concerned with the law making function, but in a modern welfare state the strict adherence to this theory has become impossible. The increase in the state's functions exerted as pressure for more and more laws. The legislature is unable to cope with the states demand to give the quality of laws which is needed for the state to function as a modern social welfare state. Hence the legislature was compelled to delegate part of the law making function to the executive. Today, the volume of delegated legislation which emanates from the executive is much more extensive then the total volume of statues coming directly from the legislature. Therefore, the delegated legislation has got a very important place in the study of Administrative law.

3.15 KEY WORDS

Legislative	-	Law making
Delegation	-	Act of delegating (conferring one's power to other person)
Bye Laws	-	sub laws
Democracy	-	The government which allows freedom
Statutes	-	on enactment by the legislature
Competence	-	ability
Impermissible	-	not allowable

3.16 ANSWERS TO CHECK YOUR PROGRESS QUESTIONS

For	Question No.1	...	Refer Section No. **3.1**
	Question No.2	...	Refer Section No. **3.5**
	Question No.3	...	Refer Section No. **3.2**
	Question No.4	...	Refer Section No. **3.7**
	Question No.5	...	Refer Section No. **3.6**

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3.17 MODEL QUESTIONS

A. Long answer questions

1. What are the delegated legislation? state the reason for its growth.
2. What are the methods of delegated legislation?
3. How far delegated legislative power is permissible in India? Can power impose tax be delegated?

B. Short answer questions

1. Hentry VIII clause – write short notes.
2. What is sub – delegation.
3. What are the impermissible delegation?

UNIT – 4

ADMINSTRATIVE DISCRETION

INTRODUCTION

The fundamental principle of rule of law is all authorities and their actions are subject to law. The administrable authorities is discharging their duties may act beyond the power or abuse the power conferred on them. As a result, individual rights and liberties may be affected. Therefore it is necessary that there should be judicial control over misuse of discretionary power of the administrative authorities so that the rights of the people are not adversely affected.

The supreme court in S.C. Advocates – on – Record Association – vs – Union of India (1933) 4 SCC 441, has made it clear that there has to be room for discretionary authority within the operation of the rule of law, even though it has to be reduced to the minimum extent necessary for proper governance. Within the area of discretionary authority, the existence of proper guidelines or norms of general application excludes any arbitrary exercise of discretionary authority. Several methods of control of administrative discretion have been developed. Eg. Doctrine of natural justice and fairness, excessive delegation, ultra vires etc.,

OBJECTIVES

- To understand the meaning and definition of Administrative Discretion.
- To discuss the need for discretion.
- To study the various types of discretion.
- To analyse the judicial control over Discretion.

UNIT STRUCTURE

4.1 Meaning and Definition of Administrative Discretion

4.2 The need for Discretion

4.3 Types of Discretion

(1) Subjective Satisfaction Type

(2) Objective Satisfaction Type

4.4 Judicial Control over Discretion

1. Abuse of Discretion
2. Violation of fundamental Rights
3. Ultravires

4.5 Summary

(Space for Hints)

4.6 Keywords
4.7 Answers to check your progress
4.8 Model questions

4.1 MEANING AND DEFINITION OF ADMINISTRATIVE DISCRETION

4.1.1 Meaning:-

The word 'discretion' implies Power to make a choice between alternative Courses of action. According to Coke, discretion is a Science or Understanding to discern between Falsity and truth, between right and wrong and not to do according to will and Private affection. In the words of Mr.Justice Frankfurter, 'Discretion without a criterion of its exercise is authorisation of arbitrariness'.

4.1.2 Definition:-

Administrative discretion is a Power which empowers an authority to make a Possible choice. Dr. A.T. Markose defines it as follows, Administrative discretion is a statutory Power Conferred on a Public authority to make choice, out of available alternative, on Considerations which are either not feasible or not possible to be declared before hand.

K.C. Davis defines it as a Power which gives him (a public authority) a free hand to make choice among Possible Course of action or inaction.

According to De Smith it means a Power to make a choice between alternative Course of action. According to Justice Coke discretion is a Science or understanding to discern between false good and truth, between right and wrong between shadows and Substance.

Words and Pharses which usually Denote Administrative Discretion:- The word 'necessary', 'reasonable', 'is satisfied', is of Opinion', 'public interest', 'Public purpose', 'efficient', 'adequate', 'advisable', 'appropriate', 'beneficial', 'Convenient', 'expedient', 'Fan', 'Fit', 'Proper', 'Sufficient', 'reason to believe', 'if he thinks' or their opposites are used in Statute it denotes that the authority is vested with one or the other kind of discretionary Power.

4.2 THE NEED FOR DISCRETION:-

The need for arming the administrative authorities with discretionary Power arise on account of Variety of Factors. Difficulty in Formulating Precise rules need for Flexibility. For experimentation, necessity of urgent action are the important factors which led to the phenomenal growth of discretionary power.

Check Your Progress Questions

1 What is administrative discretion ?

4.3 TYPES OF DISCREATION:-

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The most singular feature of discretionary power is that it is to be exercised on the satisfaction of the authority. Based on the type satisfaction it may be classified into (i) subjective type and (ii) objective satisfaction type.

4.3.1 Subjective Satisfaction Type:-

Where the statue empowers the administrative authority to set its own limits to determine the criteria for a decision, such type of discretion is called subjective satisfaction type. The expression like "if in his opinion", "if he thinks fet", if he deems", "if he considers" etc are the good examples of the subjective satisfaction type of discretion.

4.3.2 Objective Satisfaction :-

When the statue which empowers the executive with discretionary power itself imposes defined or ascertainable predetermined criteria with the help of which the decision maker must make his choice, it is called as objective satisfaction type of discretion. The existence of the objective element is a condition precedent for the exercise of the discretionary power.

(E. g) S.237 (b) of the companies Act, 1956 empowers the company Law Board to appoint Inspectors on its own motion, if there are circumstances suggesting the following, (i) Fraud , oppression or illegality (ii) Misconduct (iii) Inadequate information. Here discretion of the company Law Board to appoint Inspectors can be exercised only objectively. When any one of the above conditions are satisfied.

4.4. JUDICIAL CONTROL OVER DISCRETION

The discretionary power entersted in the hands of executive when exercised may seriously affect the personal (preventive detention) as well as property rights (acquisition, seizure, confi's cation and destruction of poverty) of an individual courts in India have expressed its difficultly in controlling the subjective satisfaction type of discretion. This does not mean that there is no control over such type of discretion and the authority can act according to its own whims and fancy. In Bhut Narth West Bengal (A I R 1974 S C 8o6) the supreme court held that the satisfaction of the administrative authority though subjective must be real and ration, not colourable fanciful, mechanical or unrelated to the object of the Act.

In the case of subjective satisfaction type of discretion the decision may be based on certain materials or facts in existence before the power is exercised but the court is excluded from examining whether on the basis or suchmetrial or facts the authority can be said to have satisfied or not.

Check Your Progress Questions

3. Discuss types of Discretion ?

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In the case of objective satisfaction type of discretion the court can examine both the aspects the existence of facts contemplated in the statue and the satisfaction of the authority in arriving the decision.

Grounds For Review :-

The Judiciary can exercise its control over the discretion on the following grounds (i) Abuse of discretion. (ii) Violation of fundamental right. (iii) Violation of natural Justice.

4.4.1 Abuse of Discretion

Abuse of discretion means sense of discretion. There are several forms of abuse of discretion. Abuse of discretion may be inferred in the following circumstance when it is exercise.

(i) With male fide intention

(ii) For improper

(iii) Colourable exercise of power

(iv) For irrelevant consideration

(v) By leaving out relevant consideration

(vi) Unreasonably

(vii) without the application of mind

(viii) mechanically

(ix) Inconsistent with the spirit and purpose for which discretion is conferred.

(i) Mala Fide :-

It means bad faith, dishonest intention corrupt motive, oblique motive or vengeance. When the exercise of discreation is tainted with mala fide the discision is bad and it is liable to be set aside. The person alleging mala fide must prove it, and proving it against the mighty administration is a difficult task.

In Pratap Singh V.State of Punjab (AIR 1964 S C 72) the petitioner was a civil surgeon and he had taken leave preparatory to retirement, initially the leave was granted but subsequently it was revoked and a departmental enquiry was ordered against him and he was placed under suspension. The enquiry was instituted against him on the charge of receiving Rs. 16 from a patient. In an illegal manner during the period he was working as a civil surgeon and ultimately he was removed from service. The petitioner alleged that all these actions were instigated by the chief minister because he had refused to yield to certain illegal demands of the chief minister and

Check Your Progress Questions

2. Malafide – write short notes.

members of his family. Though there was no direct evidence proving mala fide the court has inferred mala fide from the circumstances of the case and quashed the order by issusing a writ of certiorari.

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(ii) Improper purpose :-

Discretionary power conferred on the authority must be exercised only for the purpose for which it is granted. If it is exercised for a different purpose. It amounts to abuse of discretion and the action may be quashed. improper purpose is different from mala fide. In the case of mala fide the action is tainted with personal ill-will or malice, but it is not so in the case of improper purpose even if the action of an authority is motivated by public interest it is liable to be set aside if it was exercised for a purpose not covered by the statue.

In Hukam chand V. union of India (AIR 1976 SC 789) the petitioners telephone was disconnected on the ground of misuse for illegal trading in agricultural products. The central or state government was authorised to order such disconnection under S. 5 (1) of the Telegraph Act, 1885 on accurance of an emergency or on ground not relevant to public safety. The action was quashed.

(iii) Colourable Exercise of power :-

Where the discertionary power is exercise by the authority ostensibly for the purpose for which it is conferred, but in reality for some other purpose, it is called colourable exercise of power. Colourable exercise it is power arises when the statute does not prescribe the particular manner in which discretion must be exercised, and the authority exercises the under the colour or guise of legality.

It is very difficult to draw a dividing line between improper purpose and colourable exercise of power. Both are almost same and the difference if any are only illusory. If the Discretion is exercised for an improper purpose, There is colourable exercise of power. Similarley, if there is colourable exedrcise of power. There is improper purpose. It may be submitted that the use of anyone of the pharse improper purpose or colourable exercise may be avoided.

(iv) Irrelevant Consideration :-

Generally the statue which confers discretionary power to the administrative authorise will enumerate the relevant facts to be considered by them in the exercise of the discretionary power. Such even in the absence of any such factors in the statue an authority is expected to take relavant factors into consideration while exercising

Check Your Progress Questions

4. What is meaning of Abuse of Discretionary power?

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the discretionary power by the same taken the authority is not expected to take irrelevant factors into consideration.

In Ram Manohar Lohia V . State of Bihar (AIR 1966 SC 740) the petitioner was drained under the Defence of India Rules to Prevent him from acting in a manner prejudicial to the maintenance of law and order. The relevant rules authorised the detention of a person if his activities were found prejudicial to the maintenance of public Order. The supreme court set aside the order of detention because it was based on irrelevant considerations. The court pointed out the distinction between 'Public order' and 'law and order'.

In Nataraj a Mudailar V.S.T.A Madras (AIR 1974 SC 114) the renewal application for a contract carriage permit under the motor vehicles. Act was refused on the ground that facilities provided in the public sector undertakings were adequate. It was held that the refusal was base on an untenable reason because facilities in the public sector is not a ground for the refusal to renew the contract carriage permit.

(v) Leaving out relevant considerations :-

While exercising the discretionary power the administrative authority is expected to take all the relevant factors into consideration. Failure to do so will render the decision invalid. It is very difficult to prove that certain relevant factors were not taken into consideration by the authority, unless detailed reasons are given in the impugned order, From which it can inferred

In Rampur Distillery V.Company Lane Board (AIR 1970 SC 1978) the company Law Board refused to give, its approval for renewing the managing agency of the company on the ground that Justice Vivin Bose Commission had severely criticised the past dealings of the Managing Director Mr.Dalmia. The court concedered. That the past conduct of the Directors was relevant consideration but pointed out the Board has failed to take into account their present conduct, which is more relevant to consider the application of renewal of managing agency.

(vi) Unreasonableness

A discretionary power conferred on an administrative authority must be exercised reasonably. If the power is exercised unreasonably, it amounts to abuse of discretion and the action is liable to be quashed. A decision may be termed as unreasonable, If it is perverse, or no reasonable man would ever take such a decision, or there is no evidence to justify the decision.

In Rameshwar (shaw V.D.M.Burdawon (AIR 1964 SC 334) preventive dention order was served on the petitioner while he was already in jail. It was held that the satisfaction of the authority that the person should be detained to prevent him from action in a prejudicial manner was not possible when he was already in jail.

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(vii) Non – Application of mind by the Authority

An authority exercise discretionary function is expected to exercise the same by applying its mind to the facts and circumstances of the case in hand, otherwise it will be held bad. Non-application of mind may be attributed against the authority if the authority has failed to satisfy a condition precedent for its action, or it has exercised the discretion mechanically without applying its mind to the facts and circumstances of the case, or it has surrendered the discretion to the subordinates without acting itself, or when it is exercised under the dictation of superia authority or when it imposes fetters on the exercise of discretion.

In Nandalal Khodidas V.Bar council of Gujarat (AIR 1981 SC 477) under S. 35 (1) of the advocates Act 1961, the State Bar council has to apply its mind and to from a reasonable belief about the existence of a Prima Facie case of misconduct against an advocate before referring his case to the disciplinary committee for disposal. A resolution was passed by the coucil referring the complaint against the petitioner to the committee in a routine manner without forming an opinion that there was a Prima Facie case. The reference was held as invalid.

(viii) Acting Mechanically :-

If a discretionary power granted to an authority is exercised in a mechanical manner without applying his mind to the facts and circumstances it is considered as an abuse of discretion and the decision is liable to be quashed.

Mr.Janganath V.State of Orissa (AIR 1966 SC 1140) when a decretion order was passed against the petitioner. The grounds of detention was literally reproduced from the relevant provision in Act. The court held that the authority had not applied the mind the grounds and it has acted mechanically.

4.4.2 Violation of fundamental Rights

Part-III of the constitution of India guarantee's certain fundamental rights to the citizens and other persons. A statute when conferring discretion affecting the fundamental rights of the citizens is liable to be struck down as unconstitutional. In certain cases empowering the executive with discretion may be well within the limits

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that is to say not interfering with any of the fundamental rights but an unlawful exercise of that discretion in contravention of the fundamental rights will render the action void.

In west Bengal V.Anwar Ali (AIR 1952 SC 75) the Validity of the west Bengal special courts Act, 1950 was challenged, which empowered the state government to refer any offence for trail by a special court. According to the preamble of that Act, the purpose of the Act was speedier trial of certain offences. The respondent was tried and convicted by the special court. He challenged. The validity of the Act on the ground that it was violtative of Art.14. The supreme court held the Act invalid on the ground that it confers a wide discretion to the government because there was no yard stick for grouping either of the persons or offences for referring for trial by a special court. Moreover the expression 'speedier trial' which was too vague, uncertain and indefinite.

In Himai Lal v. Police Commissioner Ahmadabad (AIR 1973 SC 106) the Supre Court struck down Rule 7 of the Bombay Police Act, 1961 which invested the Police Commissic er with unguided discrationary power to grant or refuse the permission for any public meeting to be held on public place. The said rule was struck down on the ground that it was violative of freedom of assembly (Art 19(1)).

In Dawaraka Prasad V.State of U.P (AIR 1954 SC 224) clause 3(2) of the U.P coal control order, 1953 issued under the Essential supplies (Temporary Power) Act, 1946 was struck down by the court being violatike of Art. 19(i) (g) The said clause empowered the licensing authority to exempt any person or class of persons from taking a license and gave absolute power to the authority to grant or refuse to grant, renew or refuse to renew, suspend, revoke, camel or modify any rules, principles or directions to guide.

4.4.3 Ultravires

Ultravires means beyond powers. The discretion must be exercised within the limits of the power conferred on the authority when it exceeds the limits, it is said to be ultra vires when the limits of the desertion are precisely defind it is easy to check the excess, but if the discretion conferred is too wide, checking it on the ground of ultravires is a difficult task. In such cases the limits of the discretion must be ascertained first

Check Your Progress Questions
5. Colourable exercise of power.

In Gurbachan Singh V. Bombay (AIR 1952 SC 221) the Bombay police Act authorized two kinds f exterminates

(i) Externment from greaters Bombay and

(ii) Externment from the state of Bombay

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In the first kind the order of exterment must specify the place where (within the state) the extreme was remove himself, where as in the second kind the extreme might stay any where outside the state. An externment order issued under the first kind asking the extrene to leave greater Bombay and go to Amritsar was held ultra vires the power conferred (see also RAM Manohar Lohter V. State of Bihar (AIR 1966 SC 749).

Position in England in England, since parliament is supreme it can confer any amount of discretion on the administrative authority. The courts have always held that the discreation must be exercised in conformity with the general policy of the Act and for a proper purpose and it must be exercised reasonably. The courts in England have never accepting the concept of absolute discretion and it reviews the discretion on the above ground.

4.5 SUMMARY :

The term discretion when applied in administrative law it means choosing from amongst the various available alternatives but with reference to the rules of reason and justice and not according to personal whims such exercise should not be arbitrary. Vague and fanciful, but legal and regular under the modern welfare state it is absolutely essential that administrative authorities should be vested with some discretion, if the welfare measures are to be carried out properly. The need for conferring discretionary powers to the administrative authorities arises from the following factors. Difficulty in formulating precise rules, need for flexibility facility for experimentation, necessity of urgent action, evaluation of circumstances as and when they arise requirement of expert knowledge etc.

4.6. KEY WORDS

Discretion	-	prudence
Mala fide	-	Badfaith
Abuse	-	misuse
Expedient	-	advantageous.
Arbitrate	-	Decide between two parties
Predetermine	-	to determine before hand

4.7 ANSWERS FOR CHECK YOUR PROGRESS QUESTIONS

For Question No.1 ... Refer Section No. **4.1**

Question No.2 ... Refer Section No. **4.4.1 (i)**

(Space for Hints)

Question No.3 ... Refer Section No. **4.3**

Question No.4 ... Refer Section No. **4.4.1 (ii)**

Question No.5 ... Refer Section No. **4.4.3**

4.8 MODEL QUESTIONS

A. Long answer questions

1. "The exercise of discretion must not be arbitrary, fanciful and influenced by extraneous considerations" Elucidate.
2. Explain "Administrative discretion" giving examples.
3. Examine the concept of malafides. Discuss the malafide as a ground for challenging discretionary action of the administration.

B. Short answer Questions

1. Hukam Chand vs. Union of India
2. Subjective satisfaction – Explain.
3. Ultra Vires – Explain.

UNIT – 5
DECISION MAKING POWER OF ADMINSTRATION

(Space for Hints)

INTRODUCTION

The term "Decision Making' power of Administration" has been used synonymously with "administrative justice". In a socialist society, bulk of cases are not decided by the ordinary courts. When a dispute arises between an administrative agency and private person, it is settled by the administration.

Today the state exercises not only sovereign functions, but as a progressive democratic state, it also seeks to ensure social security and social welfare for the common masses. It regulates industrial relations, exercises control over production and starts many enterprises. The issues arising therefrom are socio-economic issues. It is not possible for the ordinary courts of law to deal with all the issued of socio-economic policies. As Wade and Philips rightly observe : "Modern government gives rise to many disputes which cannot appropriately be solved by applying objective legal principles or standards and depend ultimately on what is desirable in the public interest as a matter of social policy. For example industrial relations between the workers and the management must be settled as soon as possible. It is not in the interest of the parties to the disputes but of the society at large. It is not possible for the ordinary courts to decide these disputes expeditiously. At the same time, it is necessary that such disputes should not be determined in arbitrary or autocratic manner. Administrative Tribunals are, therefore, established to decide various quasi – judicial issues in place of ordinary courts of law. Tribunals are recognised even by the constitution of India.

OBJECTIVES

- To know about the quasi judicial bodies and administrative bodies.
- To understand its functions and need of administrative bodies.
- To analyse its methods and procedure adopted by such administrative adjudicatory bodies.

UNIT STRUCTURE

5.1 Necessity for Administrative decision making.

5.2 Problems of Administrative decision making.

5.3 Various Modes of Administrative decision making.

(i) **Statutory tribunal**

(ii) **Domestic tribunal**

(Space for Hints)

5.4 Frank's committee's Report.

5.5 Summary

5.6 Keywords

5.7 Answer to check your progress.

5.8 Model Questions

5.1 NECESSITY FOR ADMINISTRATIVE DECISION MAKING:

To day we got political independence marks the day on which we started the war against poverty, illiteracy and disease. So for providing public health, education, social security transport, agriculture and industrialisation. Massive plans have to be put forth by the government. It is not possible to carryout these programmes and determine the legal questions involved there in by the formal judiciary. For that it is necessary that the administrative authority should be given the power of decision making. Apart from that litigation before the court of law is expensive and time consuming. An alternative solution is to give the powers of decision making to administrative authority only. Administrative adjudication can give more importance to the moral social principle rather than individualistic norms and developed by courts. New public law standards have to be developed and experimented. This is possible through administrative adjudication just like in the field of medicine. In the field of administration of justice also we should try to provide preventive justice rather than punitive justice. This is not possible through formal judiciary. Moreover courts are already overburdened with pending litigation and if the formal judiciary is directed to look after fresh litigation arising in an intensive from of government, the system itself may collapse. So through administrative decision making process the existing one can be supplemented.

So far as formal judiciary is concerned it first ascertains the facts and then applies the law to the facts and come to the conclusion. So there is controlled facts finding and controlled application of law. But an administrative agency proceeds with controlled facts and applies uncontrolled policy to the facts for coming to the decision.

The committee on ministers power provides that the formal decision must have the following four elements :

(1) Presentation of the case.

(2) Ascertainment of question of fact by means of evidence given by the parties.

(3) Ascertainment of question of law on the basis of submission of legal arguments.

(4) A decision which disposes of the whole cage by applying law to the facts.

heck Your Progress uestions

Discuss the need of Administrative decision making?

An Administrative agency performing judicial function complies with the first two elements, may or may not involve the third, but never the fourth element because the administrative agency only apply policy to the facts.

(Space for Hints)

5.2 PROBLEMS OF ADMINISTRATIVE DECISION MAKING

(i) Administrative decision making process also suffers from lot of problems. Large number of tribunals are being created under different statutes and accordingly it is not possible to have a comprehensive list of these agencies. Lack of uniform procedure and uniform system of appeal create more problems to the administrative adjudication. Since the decisions as given by the administrative agencies are not being properly published the decisions go unnoticed by the public and lack the possibility of public criticism. Formal judiciary is bound by the principle of stare decicsis which gives importance to the concept pf precedent. But administrative agencies are not bound by these principles and the decisions of administrative agencies cannot be predicted (i) sometimes the matter should have been heard by one person and the decision used to come from some other authority and thus the principle of natural justice itself has not been complied with. Since the administrative agencies are not bound by the technical rules of evidence coming under the Evidence Act, the parties cannot claim to prove their case on the basis of law of Evidence.

(ii) Official bias is yet another problem faced by administrative adjudication official or departmental bias is inherent in administrative process. So administrative actions can be invalidated only if it is proved that there is bad faith or improper purpose. Though no statistics are available as to the political interference in administrative adjudication strong conviction persists among the people that administrative justice is the people that administrative justice is polluted by political interference.

(iii) Lack of reasoned decision is yet another problem of administrative adjudication Administrative agencies are not required to give reason for their decisions, but it is essential in the case of formal judiciary. In order to develop faith in the administrative justice it is essential as a general requirement that every administrative justice it is essential as a general requirement that every administrative agency must give reason atleast when demanded .

(iv) Number of complexity : Administrative agencies with adjudicatory powers are increasing day by day. Almost all statutory scheme certain its own decision making agency. Those different agencies are giving diverse decisions.

(Space for Hints)

(v) **Bewildering variety of procedure:** It is another burden with regard to administrative decisions. No uniform procedure is being applied by these agencies. Sometimes the agency is vested with the powers of civil court. Sometimes the agency is directed to frame procedure for itself.

(vi) **Unsystematic system of appeal :** In the traditional judicial system there is systematic way of appeal. But that is not available in the administrative decision making agency. Sometimes administrative decision are made appealable before independent tribunal. Some acts do not provide for any appeal and make the decision of administrative tribunal final.

(vii) Anonymity in decision making is another problem faced by administrative decision making. No one knows from where the decision comes. This divided responsibility where hears and another decides is against the concept of fair hearing. Again except in the case of evil servants, in all disciplinary proceedings the functions of the prosecutor and judge are either combined in one person or in the same department. It gives way for bias. Again technical rules of evidence is not applicable to administrative adjudications. Sufficiency of evidence in proof of finding of a domestic tribunal is beyond security. In administrative adjudication if there is some evidence in some corner that is sufficient.

5.3 MODES OF ADMINISTRATIVE ADJUDICATION :

Most popular mode of administrative adjudication is adjudication through tribunals. Two kinds of tribunals are,

(i) Statutory tribunal and

(ii) Domestic tribunal

(i) Statutory tribunal :

The term tribunals refers to adjudicatory bodies outside the sphere of ordinary courts of the land. A tribunal may possess some but not all the trappings of a court. A body in order to be designated as tribunal must be one which is invested with the judicial powers to adjudicate on questions of law or fact affecting the rights of citizens in a judicial-manner.

In Bharat Bank v. Employees of Bharat Bank the Supreme Court laid down some important characteristics of a tribunal. There are:

1) The proceedings before it must commence on an application which is in the nature plaint.

2) It must have the powers of a court relating to discovery, inspection and taking of evidence.

3) It must allow examination and cross – examination of witness.

Check Your Progress Questions

2 How many kinds of tribunals are there? Explain

4) It must allow legal representation.

5) It must decide on the basis of evidence before it and according to the provisions of the statute.

6) The members constituting the tribunal must be qualified to be judges. Apart from the above the following are also included in the list of characteristics by the supreme court by subsequent decision.

7) It must be required to set in public.

8) It must be capable of giving determinate judgment or award affecting the rights and obligations of the parties.

9) It must be invested with the states inherent judicial power meaning thereby that its constitution and the power to decide disputed must be derived from the statute.

Because of the advantages of Tribunal system part XIV-A, has been inserted in the Constitution by 42nd Amendment in the year 1976, which gives power to Parliament and state legislatures to establish Tribunals to deal with specified subjects.

Art 323-A provides that parliament may. by law, provide for the adjudication or trial by administrative tribunals of disputes and complaints with respect to requirement and conditions of service of persons appointed to public services and posts in connection with the affairs of the union or of any state or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation owned or controlled by the Government.

A law made under the above provision may :

(i) Provide for the establishment of an administrative tribunal for the union and a separate administrative tribunal for each state or for two or more states;

(ii) Specify the jurisdiction, powers (including the power to punish for contempt) and authority which may be exercised by each of the tribunals;

(iii) Provide for the procedure (including provision as to limitation and rules of evidence) to be followed by these tribunals;

(iv) Excludes the jurisdiction of all courts, except the jurisdiction of the supreme court under Article 136.

(v) Provide for the transfer to each administrative tribunal of any cases pending before any court or other authority.

(Space for Hints)

Check Your Progress Questions

5 What is statutory tribunal?

(Space for Hints)

(vi) Contain such supplemental, incidental and unsequential provisions (including provision as to fee) as may be necessary for the effective functioning of such tribunals.

These provisions of constitution includes that we are at the hold of a new area of tribunals. No exhaustive list of the tribunals already working can be prepared as they appear under various names, the following important tribunals are at work in various fields.

(i) Industrial Tribunal :

The industrial tribunal and National tribunal are created by the central Government under section –7 A and 7-B respectively of the Industrial Disputes Act, 1947 (To settle the disputes between the employer and employees).

(ii) Railway Rates tribunals :
It is consisted under the Indian Railway Act, 1980.

(iii) Income Tax Appellate Tribunals :
It is consisted by the central Government under section 252 of the Income Tax Act.

(iv) Employee's Insurance court:
It is established under the employee's state Insurance Act, 1946.

(v) Copyright Board established under the copy right Act 1958.

(vi) Repeal or amend any order made by the president under clause 3 of Article 371 –D

(vii) Contain such supplemental, incidental and consequential provisions (including provisions as to fee) as parliament may deem necessary for the effective functioning of, and for the speedy disposal of cases by, and the enforcement of the orders of such tribunals.

Article 323-B provides that the appropriate legislature may, by law, provide for the adjudication or trial by tribunals of any disputes, complaints, or offences with respect to all or any of the matters enumerated below with respect to which such legislature has power to make laws:

(a) Lay, assessment, collection and enforcement of any tax.

(b) Foreign exchange, import and export across customs frontiers.

(c) Industrial and labour disputes.

(d) Land reforms by way of acquisition by the state of any such estate or any right or the extinguishment or modification of any such rights or by way of ceiling on agricultural land or in any other way.

(e) Ceiling on urban property.

(ii) Domestic Tribunals :

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Domestic tribunals are those administrative agencies which are designed to regulate professional conduct and to enforce discipline among the members by exercising investigatory and adjudicatory powers. Domestic tribunals are of two kinds. They are

(1) Contractual domestic tribunals, and

(2) Statutory domestic tribunals.

Contractual domestic tribunals are those which exercise jurisdiction arising out not from a statute but from an agreement between the parties. For example an agency constitutional by a private club to decide disputes between its members.

Statutory domestic tribunals are those which derive power and authority from a statue and exercise regulatory and disciplinary jurisdiction over its members. Such agencies have been created under The Advocates Act 1961, Medical Councils Act, 1945 etc.

Crichel Down Affair :

The Crichel Down affair led to the appointment of the Frank's committee enquires and tribunals. Crichel Down is a locality in Dorset. Where the Defence ministry compulsorily acquired certain lands for use as a bombing range during the war in 1937. After the war the original owners requested for its re-sale to themselves, but the authorities decided to retain it under the government's control and the land was transferred to the ministry of Agriculture for use as model farm. The claim of the original owners were handled by the various officials of the government with too little care and consideration. This affair led not only to the resignation of the minister of Agriculture, but also the appointment of the Frank's committee to look into the system of adjudication by the administration.

5.4 FRANKS COMMITTEE'S REPORT :

The Franks Committee was appointed in 1955 to consider and make recommendations on the following two questions.

(1) What should be the constitution and working of tribunals? And

(2) What procedure should be adopted by such administrative tribunals?

The Franks Committee gave its report in 1957. Among the various recommendations of the committee, the following are important.

(i) when parliament leave the decision of certain questions to an administrative tribunals, the tribunal should function as a machinery for adjudication and not as part of the machinery of administration

Check Your Progress Questions

3 When the Frank's committee was appointed?

4 Which one is final recommendations of Franks committee?

(Space for Hints)

and their proceeding should be characterised by openness, fairness and impartiality.

(ii) These should be some provision for an appeal from these tribunals to the courts on the question of law.

(iii) An advisory council should be established, appointed by the lord chancellor to report on the working of the tribunals.

Based on the recommendation of the committee, the Tribunals and Enquires Act, 1958 was passed substantially incorporating all the recommendations of the committee. The Act, provides for the following matters.

(i) A council or Tribunals appointed by the Lord chancellor, has been constituted to keep under review the constitution and working of the tribunals specified in the schedule of the Act.

(ii) Appeal on points of law shall lie to the High court and in certain cases further appeal to the court of appeal.

(iii) The High Court's supervisory powers issuing certiorari or mandamus cannot be taken away by law which creates the administrative tribunals.

(iv) Reasons for the decision of the tribunals must be given if requested by the parts.

5.5 SUMMARY

Today bulk of decisions are coming not from the formal judiciary but from quasi – judicial bodies (or) administrative bodies exercising judicial functions. Because of the change of Government's philosophy from the laissez faire to the 'social welfare state' has inevitably led to a phenomenal growth of administrative law. Owing to the expansion of the governmental machinery in the modern welfare state, the ordinary courts of law are over burdened and find it difficult to solve all the problems.

In order to overcome this situation and to minimise the workload of the courts, many administrative tribunals have been emerged in India. We have already discussed all these aspects in this unit.

5.6 KEY WORDS

Adjudication - Settle on the merits of an issue (give judgement)

Litigation - A lawsuit

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Predicate - Assert to be true.

Anonymity - Having the name that is not publicly made known.

Jurisdiction - Right to exercises legal authority.

5.7 ANSWERS FOR CHECK YOUR PROGRESS QUESTIONS

For Question No.1 ... Refer Section No. 5.1
Question No.2 ... Refer Section No. 5.3
Question No.3 ... Refer Section No. 5.4
Question No.4 ... Refer Section No. 5.4
Question No.5 ... Refer Section No. 5.3

5.8 MODEL QUESTIONS

A. Short answer questions

1. Statutory tribunals – write short notes.
2. Types of Domestic tribunals – write short notes.
3. Franks committee Report – give short answer.

B. Long answer questions

1. Discuss the nature and position of Administrative Tribunals?
2. Discuss the problems of Administrative decision making?
3. Explain the necessity for the Administrative decision making?

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UNIT – 6
RULES OF NATURAL JUSTICE

INTRODUCTION

Natural justice is an important concept in administrative law, in the words of Megarry. J. It is 'justice that is simple and elementary, as distinct from justice that is complex, sophisticated and technical'. The principles of natural justice or fundamental rules of procedure for administrative action are neither fixed nor prescribed in any code. They are better known than described and easier proclaimed than defined. 'Natural justice' has meant many things to many writers, lawyers and systems of law. it has many colours and shades and many forms and shapes. According to De Smith, the term 'natural justice' expresses the close relationship between the common law and moral principles and it has an impressive ancestry. It is also known as 'Substantial justice' 'fundamental justice', 'universal justice', or fair play in action. It is a great humanising. These principles intended to invest law with fairness, to secure justice and to prevent miscarriage of justice. **In Wiseman .V. Borneman, it was observed.**

"The conception of natural justice should at all stages guide those who discharge judicial functions is not merely an acceptable but is an essential part of the philosophy of the law...."

OBJECTIVES

- ❖ To understand the meaning, historical growth and related statutory provisions of Natural justice.
- ❖ To discuss the Rules of Natural justice.
- ❖ To study and discuss various types of Natural justice
- ❖ To analyse the Exclusion of Natural justice
- ❖ To discuss the terms of Resjudicata, stare decisis and Doctrine of Ultra vires.
- ❖ To study the scope of Doctrine of Estoppel.

UNIT STRUCTURE

6.1 Definition
6.2 Historical growth
6.3 Natural justice and statutory provisions
6.4 Against whom natural justice can be enforced
6.5 Principles of natural justice.

(i) Nemo Debet Ease – Judex in propria causa (or) Nemo Judex in causa sua

(ii) Rule Audi Alterm Partem.

6.6 Exclusion of natural justice

6.7 Resjudicata

6.8 Stare decisis

6.9 Doctrine of Ultra vires

(i) Substantive Ultra vires

(ii) Procedural Ultra vires

6.10 Investigation and enquires

6.11 Doctrine of Estoppel

6.12 Summary

6.13 Key words

6.14 Answer to Check your progress.

6.15 Model questions

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6.1 DEFINITION OF NATURAL JUSTICE

There is no precise and scientific definition of 'Natural Justice'. However, the principles Natural Justice are being accepted and enforced. Different judges, lawyers and scholars defined it in various ways.

In **Vionet . V. Barreh** (1885) 55 L JRB 39, Lord Esher M.R, has defined it as 'The Natural sense of what is right and wrong'. Later he had chosen to define Natural justice as 'fundamental justice.' In a subsequent case **C.Hopkins.V. Smethevick Local Board of Health** (1890) 24 Q B 713)

Lord Parker has defined it as 'duty to act fairly', Mr. Justice Bhagwati has taken it as "Fair play in action". Articles 14 and 21 of the Indian Constitution have strengthened the concept of Natural justice.

6.2 HISTORICAL GROWTH

According to De Smith, the term 'Natural justice' the close relationship between the common law and the moral principles and describes what is right and what is wrong. It has an impressive history. It has been recognised from the earliest times it is not judge – made law. In days bygone the Greeks had accepted the principles that 'no man should be condemned unheard'. The historical and philosophical foundations of the English concept of natural justice may be insecure, nevertheless

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they are worthy of preservation. Indeed from the legendary days of Adam and of Kautilya's Arthashashtra, the rule of law has had this stamp of Natural justice which makes it social justice.

6.3 NATURAL JUSTICE AND STATUTORY PROVISIONS

Generally, no provision is found in any statute for the observance of the principles of Natural justice by the adjudicating authorities. The question than arises whether the adjudicating authority is bound to follow the principles of natural justice. The law is well-settled after the powerful pronouncement of **Byles.J in Cooper .V. Wandsworth Board of works**, wherein His Lordship observed.

"A long course of decisions beginning with Dr.Bentley's case and ending with some very recent cases, establish that although there are no positive words in the statue requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature.

De Smith also says that where a statute authorising interference with property or civil rights was silent on the question of notice hearing, the courts would apply the rule as it is "of universal application and founded on the plainest principles of Natural justice".

The above principles is accepted in India also. In the famous case of **A.K. Kraipak.V. Union of India.** Speaking for the Supreme court, Hegde.J. Propounded.

The aim of the rules of Natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validity made.

In maneka Gandhi V. Union of India

Beg, C.J. observed: it is well established that even when there is no specific provision in a statute or rules made there under for showing cause against action proposed to be taken against an individual, which affects the rights of that individual, the duty to give reasonable opportunity to be heard will be implied from the nature of the function to be performed by the authority which has the power to take punitive or damaging action.

6.4 AGAINST WHOM NATURAL JUSTICE CAN BE ENFORCED

It is settled law and there is no dispute that the principles of natural justice are binding on all the courts, judicial bodies and quasi judicial authorities. But the important questions are 1) whether these principles are applicable to administrative authorities? 2. whether those bodies are also bound to observe them? 3) whether an administrative order passed in violation of these principles is ultra vires on that

ground? Formerly, courts had taken the view that the principles of natural justice were inapplicable to administrative orders.

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In Frankin .V. Minister of Town and country planning (1947) 2 All ER 289.

Lord Thankerton observed that as the duty imposed on the minister was merely administrative and not judicial or quasi judicial, the only question was whether the minister has complied with the direction or not.

In the words of Chagla .C.J. it would be erroneous to import into the consideration of an administrative order the principles of natural justice.

In Kishan Chand. V. Commissioner of Police AIR 1961 SC 705 (710)

Speaking for the Supreme court. **Wahchoo, J. observed.** 'The compulsion of hearing before passing the order implied in the maxim 'audi alteram partem' applies only to judicial or quase judicial proceedings'.

But as observed by Lord Denning, at one time it was said that the principles of natural justice applied only to judicial proceedings and not to administrative proceedings, but that hereby was scotched

In Ridge – V - Baldwin (1964) AC 40 Wade states that the principles of natural justice are applicable to 'almost the whole range of administrative powers.

6.5 PRINCIPLES OF NATURAL JUSTICE

They are :

i) Nemo judex in causa sua : No one should be made a judge of his own cause or the rule against bias.

ii) Audi Alterem Partern : Hear the other party or the rule of fair hearing, or the rule that no one should be condemned unheard. Now let us see these principles in detail.

i) Rule against bias : A judge is expected to give an impartial decision based no evidence on record. But if he is interested in the case he cannot give an impartial decision. Rule against bias provides for impartial decision. Bias arises from different aspects.

a) Personal bias:

A person who is acting as a judge should not in any way interested or related to the parties to the case. If so it may adversely affect the decision. It can be illustrated through judicial decisions.

Check Your Progress Questions

1 Explain the Maxim "Nemo Judex in re sua"

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Mineral Development Ltd. V. State of Bihar: In this case the petitioner obtained a mining licence in the year 1947 for a period of 99 years. In 1953, secretary of the Revenue Board sent a notice to the petitioner to show cause within 15 days why the licensed should not be cancelled for violation of certain provisions of the Mining Act. Though the petitioner gave a proper reply, the government questioned the petitioner. The petitioner questioned the government action on the ground of personal bias. The points relevant here *are*.

a) That Raja Kamakshya Narain Singh the owner of the Mineral Development Ltd had opposed the Minister in the general elections of 1952. b) That the Minister had filed a criminal case under S.500 I.P.C. against the petitioner which was transferred by the High court of the State of Bihar to Delhi on the ground of political rivalry between the parties.

These two points clearly show that there is personal bias and the Supreme Court quashed the order of the' government.

***A.K. Kraipak V.* Union *of India* (1969) 2 SCC 262 (272):** In this case Naquishbund, who was a member of the selection board was also a candidate for selection to the All India cadre of forest service. Though he did no take part in the deliberations of the board when his name was considered and. approved, the Supreme Court held that there was a real likelihood of bias, for the mere presence of the candidate on the selection board may adversily influence the judgement of the other member.

About the importance of this case, Bhagwati.J. has observed :

A.K. Kraipak is a landmark in the development of administrative law and it has contributed in large measure to strengthening of the rule of la in this country.

Similarly in the case of **S.P. Kapoor .V. State of HP**: (AIR 1981 SC 2181)

Where the Departmental promotion committee considered the confidential reports of the candidates prepared by an officer who himself was one of the candidate for promotion. The supreme court quashed the selection.

In Tata Cellular .V. Union of India (1994) 6 SCC 651

The decision of the supreme court stands at a different footing. In this case the facts were that the tender for opera ling cellular mobile telephone service in four metropolitan citics field by the son of one of the member of Tender Evaluation committee had been accepted. This action was challenged on the basis of personal bias. On the ground of personal necessity because the involvement of Director General

of Telecommunication and Telecom Authority was necessary in view of S.3 (6) of Telegraph Act, 1985 the court held that the involvement of his father as member of Tender Evaluation committee did no vitiate the selection on ground of personal bias.

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b) Pecuniary bias :

Whenever financial interest involved whether it is small or large, it may adversely affect the proceedings and so it may wholly disqualify a person from acting as adjudicator. Whenever pecuniary bias is alleged court will view. It with utmost seriousness.

In Dimes v. Graud Junction canal co. the decision of the Lord Chancellor in favour of the canal co. was quashed by the House of Lords, because he was shareholder of the company. It was accepted by the House of Lords that the Lord chancellor was not in the remotest degree influenced by the interest that he had in this concern. But still the principle that no one should be a judge in his own cause was upheld

In Visakapatnam Co-op motor Transport Ltd .V. Bangaruraju : (AIR 1953 Mad.709)

A corporate society wanted a permit. The collector was the president of that society and at the same time he was also chairman of the Regional Transport Authority granting permit in favour of the society. The decision was guashed by the court as it was in violation of the principles of natural justice.

The same was position in **Annamalai .V. State of Madras** (AIR 1957 AP 739). Where one of the members of the Regional Transport Authority issued a permit in his own favour. Afterwards he transferred the same permit in favour of his Son-in-law. However the court quashed the order as it was against Natural justice.

c. Subject matter bias :

Here again is a case where the deciding authority is directly or indirectly interested in the subject matter of the dispute. In *Gullapalli Nageswara Rao V. A.P.S.R.T. Corporation,* the Supreme Court quashed the decision of the Andhra Pradesh government, nationalizing road transport on the ground that the secretary of the transport department who gave hearing was interested in the subject matter.

In administrative decisions, it is very difficult to find cases where there is no involvement of bias involving subject matter. In one way or other the officials will be concerned in the decisions. So when the judiciary is considering such bias, it has to ascertain the degree of personal involvement of the official in the formulation or

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implementation of policy. Such a matter was considered by the Supreme Court in ***Baidyarath Mahopatra v. State of Orissa.*** In this case a government employee was prematurely retired from government service on the recommendations of a review committee. One of the members of this review committee was later appointed as the chairman of the state Administrative Tribunal. The petition filed by the employee before this SAT was dismissed by the Tribunal. On appeal before the Supreme Court, the Supreme Court observed that even though the chairman might have acted bonafide, the principles of natural justice, fair play and judicial discipline required that he should have abstained from hearing the case.

In some cases the authority which is empowered to decide a matter way be directed to decide in a particular way by the superior authority. In such cases there is no scope for exercising ones own judgement and has to decide the matter in accordance with the direction of the superior authority. It is a case of violation of the rule against bias.

The courts used to apply two tests to ascertain whether there is bias or not. They are - the real likely hood test and the reasonable suspicion test.

d) Departmental bias

Departmental bias is inherent in every administrative adjudication. Departmental fraternity and loyalty viciates the concept of fair hearing.

The leading case on this point is **Gullapalli Nageswar Rao.V. Andhra Pradesh state –Road Transport Corporation :** (Gullapalli .I) (AIR 1959 SC 309)

In this case the Transport ministry issued a direction to the secretary to the Transport Department to hear objections under section 68 (a) of the motor vehicles Act to the proposed scheme of Nationalisation. The objections filed by the petitioners were received and heard by the secretary and there after the scheme was approved by chief minister. The S.C. the accepted the contentions of the petitioner that the official who heard the objections was 'in substance' one of the parties to the dispute and this was against the principles of natural justice.

But in Gullapalli II (AIR 1959 Sc 1379) case,

The minister heard the objections and decided the case rejecting the objections. The decision of the minister was upheld. The supreme court observed that the proceedings were not vitiated as the secretary was a part of the department . whereas the minister was only primarily responsible for the disposal of the business pertaining to that department.

In Mahadayal . V. C.T.O: AIR 1961 SC 82

According to the opinion of the Commercial Tax Officer, the petitioner was not liable to pay tax. Even then he referred the matter to his superior officer. On

receipt of instructions from him, he imposed tax. The supreme court quashed the decision.

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e) Pre-conceived notion bias :

Since the same departmental person is acting as the judge, he will be having the pre-conceived notion that the other party is always guilty. It is also an inherent defect of administrative adjudication.

These are the different kinds of bias which may viciate an administrative adjudication.

ii) The Rule of Fair hearing or Audi Alterem Pertem :

This is the Second principle of natural justice which protects people from arbitrary administrative actions. It means that the person must be given an opportunity to defend himself. It has been frequently said that the benefit of this rule has been given to Adam and Eve, even by God before they were punished. Administrative agencies though not bound by the technical rules of procedure as that of courts sof law, are bound to follow the minimum procedure of fair hearing. The right of fair hearing covers every stage of administrative adjudication starting from notice to the final determination.

6.5.1 Right to notice

Notice is the starting point of any hearing. A person must be informed of the issues involved in the case. So notice must contain the following :

(a) Time, place and nature of hearing.

(b) Legal authority under which hearing is to be held.

(c) Statement of specific charges which the person has to meet.

The notice should be clear. It should not be vague. The Supreme Court in ***N. S. Transport co v. State of Punjab*** held the action taken by the authorities as bad because the requirements of notice was not satisfied. In this case the transport commissioner issued a notice asking this company to show cause why action to suspend/cancel the permits under S.60 of the Motor Vehicles Act, 1939 should not be taken against it. That particular section requires that the proposed action should specify the permit details and also the breach of which provision action is proposed to be taken. The requirement is not complied with.

Object of notice

The object of the Notice is to provide an opportunity to the person so that he can equip himself to defend his case. Any order passed without giving a notice is against the principles of natural justice and a void ab initio.

Check Your Progress Questions

2 Discuss Types of bias?

(Space for Hints)

Maneka Gandhi .V. Union of India (1978) 1 SCC 248 AIR 1978 SC 597.

It is a leading case in personal liberty under Article 21 of the Indian constitution. The petitioner, Menaka Gandhi's passport was impounded without giving any opportunity (by the Government of India) in public interest. The supreme court held the order of the Government violative of the principles of National justice, and laid down the following propositions:

1. The adjudicating authority (judge) must be impartial and without any interest or bias.
2. The adjudicating authority, whether judicial or quasi-judicial cannot delegate or sub-delegate its power (the power to decide the case should not be delegated)
3. The adjudicating authority must disclose all the material placed before it and must give reasonable opportunity to the affected interest to submit their case.

6.5.2. Right to present the case and evidence :

Reasonable opportunity must be given to present the case and evidence. This can be done either orally or in writing at the discretion of the authority concerned. This does not mean that the person concerned can unnecessarily prolong and confuse administrative proceedings by adducing irrelevant evidence.

In ***Dhakewari. Cotton Mills v. C.I. T.*** the petitioner was denied an opportunity to produce some books of account which he was not able to produce earlier owing to reasons beyond his control. Supreme Court held that this denial of opportunity amounted to a violation of this principles of natural justice.

6.5.3. Right to rebut adverse evidence:

The person concerned should be informed of the evidence available against him. It is sufficient if the summary of the contents of the adverse material is made available provided it is not misleading. It is also necessary that he should be given an opportunity to rebut the adverse evidence. Rebuttal can be made either orally or in writing. The opportunity to rebut evidence involves the consideration of two factors. They are right of cross examination and right of legal representation. Cross examination is helpful for eliciting truth from the parties. The right of cross examination is an essential ingredient of fair hearing. Normally legal representation in any administrative proceeding is not considered as an indispensable part of fair hearing. This denial is justified on the ground that the lawyers tend to complicate

Check Your Progress Questions
3 Explain the essential of fair hearing
4 Menaka Gandhi V Union of India discuss

matters. But the courts in India have held that in situations where the person is illiterate or the matter is complicated and technical or expert evidence is on record or a question of law is involved or the person is facing trained prosecutor, some professional assistance must be given to the party to make his right to defend himself meaningful.

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6.5.4. No evidence should be taken at the back of the other party

Ex parte evidence taken in the absence of other party violates the principle of fair hearing. Opportunity must be given to rebut the evidence. If not it is against the recognized principle of fair hearing. Opportunity must be given to rebut the evidence. It not, it is against the recognized principles of natural justice. Supreme court had occasion to consider this power in ***Hira Nath Mishra V. Principal, Rajendra Medical college***, in this case whatever evidence was collected at the back of the appellants was brought to their notice and they were provided with an opportunity to rebut evidence. So the contentions that the evidence was taken at the back of the party was rejected by the Supreme Court.

6.5.5. Report of the enquiry to be shown to the other party :

Whether the report should be furnished to the party or not depends on the circumstances of every individual case. If the non disclosure of the report causes any prejudice in any manner to a party it must be disclosed, otherwise non disclosure would not amount to a violation of the principles of natural justice.

6.5.6. Reasoned decisions or speaking order :

In India there is no general statutory requirements that the administrative agency should give reasons for their decision. But if the statute under which the authority is functioning provides for that it is mandatory that the authority should give reasons for their decision. It gives an opportunity for the party of know the reasons for the decision. In India, reasoned decision is not yet accepted as an integral part of natural justice. Our supreme Court in ***Rana Natwar Singh V. State*** held that a quasi judicial body is not under an obligation to give reasons for its decisions and giving of reasons is not a requirement of natural justice.

Recently our S.C. considered the question of speaking orders in ***Naga Peoples Movement of Human Rights v. Union of India.*** The question for consideration is whether the Central Government acting under S.6 of the Armed Forces (Special Provisions) Act, 1958 was bound to pass a speaking order. S.6 conferred on the government discretion to grant or refuse to grant sanction for instituting prosection against any person in respect of any act done in exercise of powers conferred by the

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Act. The court held that since the order was subject to judicial review the government was bound to pass a speaking order.

6.5.7. Institutional decisions or one who decides must hear

The expression one who decides must hear in common law is known by the term institutional decisions in American law. In administrative proceedings it often happens that one person hears and another person decides. This divided responsibility may work contrary to the concept of fair hearing. This point was considered by our Supreme Court is ***Gullapalli Nageswara Rao V.A.P.S.R.R.C.*** In this case the petitioner challenged the order of government confirming the scheme of road nationalization on the ground that the secretary of the Transport Department gave the hearing and the final decision came from the Chief Minister. Supreme Court held that this divided responsibility was against the concept of fair hearing because one who decides does not hear the party, he gets no opportunity of clearing the doubts in this mind by reasoned arguments.

6.5.8. Rule against dictation :

Administrative decision must actually come from the person who decides. Therefore if a decision is taken at the direction of any outside agency, there is violation of fair hearing.

6.5.9. Financial Incapacity to attend the enquiry

If the circumstances are such that due to financial incapacity a person is unable to attend enquiry proceedings and thus does not have opportunity to adduce and rebut evidence, it may amount to a denial of fair hearing.

6.5.10. Decision in Post-haste :

It is fundamental principle of fair hearing that the administrative authority should not rush decisions. Supreme Court in ***City Corner V.P.A. Collector and Addl. magistrate*** held that an order passed in post haste without supplying the copies of adverse material or intimating that the summary of documents already supplied was sufficient, offends the principles of natural justice.

6.6. EXCLUSION OF NATURAL JUSTICE

It is not necessary that the administrative agency must always follow the principles of Natural Justice. Under the following circumstance principles of Natural justice need not be complied with,

Check Your Progress Questions

5 What is meaning of Resjudicate?

6.6.1. During the time of emergency:

It is an extraordinary situation wherein we can't expect normal procedural formalities. In such circumstances, the principles of natural justice need not be

followed. Even in the situation of emergency where precious rights of the people are involved, post-decisional hearing has relevance to administrative and judicial gentlemanliness. In ***Maneka Gandhi v. Union. of India*** the government impounded the passport of the petitioner journalist without any hearing and also refused to give reasons in the interest of the general public. Supreme court quashed the decision of the government and held that even in those cases where prompt action is needed, like the present all post decisional hearing will meet the requirements of administrative gentlemanliners.

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6.6.2. In case of dire public Interest: In cases where the process of fair hearing would jeopardise public interest the requirement of notice and hearing may be dispensed with. Such situations may cover the cases of defence or state secrets.

6.6.3. Exclusion In disciplinary actions : Exclusion of fair hearing in administrative action involving disciplinary actions is no longer the rule. But in case where notice and hearing is not possible because of the number and complexity, the disciplinary actions may be taken without applying with the requirements of fair hearing. In ***Radhakrishnan v. Osmania University***, where the whole MBA examination was cancelled by the University because of mass copying, the court held that notice and hearing to all the candidates is not possible in this kind of action which is taken as a disciplinary measure to solve a problem which has assumed national importance.

In the following cases, the principles of natural justice may be excluded:

1) Where a statute either expressly or by necessary implication excludes application of Natural justice.
2) Where the action is legislative in character, plenary or subordinate.
3) Where the doctrine of necessity applies.
4) Where the facts are admitted or undisputed.
5) Where the inquiry is of a confidential nature.
6) Where preventive action is to be taken
7) Where prompt and urgent action is necessary.
8) Where nothing unfair can be inferred by non-observance of Natural justice.

Conclusion :

One thing should be noted. Inference of exclusion of Natural Justice should not be readily made unless it irresistible, since the courts act or presumption that the legislature intends to observe the principles of Natural Justice and those principles do not supplant but supplement the law of the land. Therefore, all statutory provisions

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must be read, interpreted and applied so as to be consistent with the principles of natural justice.

It is submitted that the following observations of **Chanrachud .V. C.J.** in the leading case of **Olga Tellis. V. Bombay Municipal Corporation,** lay down correct proposition of law.

6.7. RES JUDICATA

The principle of resjudicata originates from the need to have finality to the decisions of courts. It is dealt with in section II of the Civil Procedure Code. It means that if an issue had been made the subject matter of the previous suit end had been raised, tried and decided by a competent court having jurisdiction to try the suit, the same issue cannot again be raised, tried or decided by any court between the same parties in the subsequent suit. This general principle underlying the doctrine of resjudicata applies even to administrative adjudication. If a petition had been heard and dismissed, the same petition on the same ground cannot be filed in the same court again. For the application of resjudicata the following conditions should be satisfied.

1. The provisions of the judgement which is relied upon must be judgement of a court of competent jurisdiction.
2. That the judgement must have directly decided the point which arises for determination in later proceeding.
3. That the point or question raised in the subsequent proceedings must be identical.
4. That the parties to both the proceedings must be the same.
5. That there was a dispute between the parties in the previous proceeding upon which there would have been a judgement.
6. That the matter in the subsequent proceeding to which the rule of resjudicata is sought to be applied must be indentical with the matter with respect to which the point was decided in the previous proceedings.
7. That the previous court must have been a court of competent jurisdiction. This rule is applicable to the enforce ment of fundamental right also. The general principle of resjudicata applies to writ petitions filed under Art. 32 or 226 of the Constitution. Where the same question has been decided by the High Court a petition under Art 226 and the court comes to the conclusion that no relief can be granted to the petitioner, such a decision operates as resjudicata in a subsequent

petitioner for the same relief. But there is one exception to this rule. That is the principle of resjudicata is not applicable to a petition for a writ of habeas corpus under Art 32, although a writ on the same ground has been dismissed by the High Court. Thus a petitioner whose writ petition for habeus corpus has been rejected by the High Court under Art. 226 can file a writ in the Supreme Court on the same facts. Res judicata shall apply even if the petition has been dismissed without giving notice to the other part or in lamine, assigning any reason.

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6.8. STARE DECISIS

Stare decisis means stick on to the decision. The doctrine of stare decisis is the doctrine on which the binding nature of precedent depends. According to this doctrine every inferior court is imperatively bound by the decisions of superior courts in the same hierarchy. This doctrine is based on the utilitarian principle that to follow past decisions or to take the same course as has been already taken is advantageous for it confers the advantage of past experiences and saves us from the effort of having to think on solutions to the very same problems every time they arise. An efficient system of law reporting is necessary because judiciary law is to be found only in law report. This doctrine is justified on several grounds.

1) It provides uniformity and certainty in legal administration.
2) It is a proof of custom, Judicial decisions serve as records, recording the customs of the land.
3) It shows respect for the opinion of one's predecessors.
4) Individual caprice of tile judge while deciding disputes is controlled.
5) Convenience and expediency demand that once a solution has been found for a problem it should not be the subject matter for re-argument every time it arises. But this doctrine brings rigidity in its application.

6.9. DOCTRINE OF ULTRA VIRES

Ultra vires means beyond the powers. An authority is expected to act within the powers that is being conferred by the statute. If the court finds that an authority nas acted beyond the powers, the court will declare the act to be void and of no legal effect. Ultra vires is or two types (1) Substantive ultra vires and (ii) Procedural ultra vires.

6.9.1. Substantive ultra vires :

It means that the administrative authority cannot go beyond the policy laid down in the statute. We have seen that administrative authorities are vested with rule

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making powers. While exercising this power of rule making it cannot go beyond the parent enactment, if it goes beyond the purpose it is substantive ultra vires. Our Supreme Court considered this point in ***Venkateswara V. State of A.P.*** **(A.I.R. 1996 S.C. 829),** Section 69 of the Andhra Pradesh Panchayat Samithies and Zilla Parishad Act, 1959, conferred power upon the State Government to make rules for carrying out the purpose of the Act. Rule 2 of the rules so framed by the government provided that the panchayat would make recommendations to the government for locating a health centre and rule 3 (ii) provided that in case of conflict between the relevant authorities in regard to the location of a Health centre, the government order shall be final. These rules were struck down by the Supreme Court as ultra vires. Because under sec. 69 of the Act the government can only make rules for carrying out the purpose of the Act. It cannot under the guise of the said rules convert authority with power to establish a primary health centre into only a recommendatory body. It cannot, by any rule vest in itself a power which the Act vests in another body".

If the statutory power is exercised for a purpose other than that for which the statute conferred it, ceases to be under he statute and the Act as done becomes ultra vires.

ii) Procedural ultra vires:

It means compliance with a particular mode in which it has to be made. If the procedural formalities prescribed by the statute has not been followed by the delegated authority, it can be challenged as ultra vires. Where a statute prescribes a procedure or condition precedent for the doing of a thing or the exercise of a power and if the procedure is described as mandatory one, non-observance of it renders the resulting act void. But breach of a direction or condition would not invalidate the order.

6.10. INVESTIGATIONS AND ENQUIRIES :

Investigations are necessary to collect data or facts upon which it is proposed to decide, how to act, where to act, where to act and what to do. This investigation or collections of information is necessary for its legislative, judicial and executive acts. This power of invention is in the nature of police power and they may-consist of :

1. Seeking informations.
2. Inspection of sites and records
3. Search
4. Seizure of records or articles

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5. Supervision and

6. Prosecution

The executive is having the inherent right to collect information on all facts to enable it to perform its duties properly and effectively. This power of the executive is subject to judicial review. When they are conducting investigations they are bound to follow the rules of natural justice. Investigations are held by the executive under the power derived from the statute. These statutes generally prescribe the procedure to be followed by the executive. Sometimes the statute authorises the investigation authority to prescribe its own procedure but occasionally no provision is made prescribing a procedure. When the statute prescribes the procedure the authority must act strictly according to the procedure prescribed. Where the statute does not prescribe a procedure some sort of procedure has to be observed. This procedure is supplied by the common law of the land in the form of rules of natural justice. In the third class of cases where the statute, has prescribed the procedure it has to comply with two conditions.

1. The procedure must be announced before hand

2. It should not violate the fundamental rules of judicial procedure.

The main purpose of the investigation is to collect and report facts after collecting them and ascertaining the truth of them. The investigation report has no binding effect; it has to be approved by the government before any action can be taken on it.

A commission of inquiry is part and parcel of administrative action in that they form part of the process by which the executive exercises its discretion. A commission of inquiry is however, require a separate class of administrative action. The inquiry is conducted by a third person who is not part of the administrative body, but is specially appointed for the purpose by the executive to enable it to take a decision in some matter of public importance. The duty of the commission is to make a probe into certain allegations which are placed before it by a suitable notification. The commission does not take any action, it only submits a report. The government or the executive to take action on the basis of the investigation or the report. The part played by the commission is part and parcel of administrative action.

Such commission of inquiry may be appointed by the government under the provisions of different Acts for the purpose of making a full and complete investigation into the circumstances of various cases involving general questions of public importance with a view to frame policies and this have become very common nowadays. Such commissions are appointed under the Commission of Inquiry Act

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1952, The Industries (Development end Regulation) Act, 1951 the Tariff Commission Act, 1951, etc. Inquiry commissions are also constituted under the public Servants (Inquiries) Act, 1850 or under the All India Services (Discipline and Appeal) Rules 1955. Apart from these, inquiries are also conducted under Railways Act, the Mines Act, 1952. The Co-operative Societies Act, 1912 etc.

Generally a clause is inserted in the statute by which the actions of the administrative authority is made final. Such a clause may be given various names such as finality clause, private clause, exclusion clause, ouster clause and conclusive clause. There are three usual modes of conferring administrative finality.

Some times the finality clause in a statue may make the administrative action final by expressly barring the jurisdiction of courts. For example Sec. 2 of the Foreigners Act, 1946 provides that the administrative action taken under this Act "shall not be called in question in any legal proceedings before any court of law".

Sometimes the finality clause does not expressly bar the jurisdiction of the court but otherwise makes the administrative action final. For example, S.17 (2) of the Industrial Disputes Act, 1947 provides that the actions of the administrative authority shell be final.

Some times the statute neither expressly bars the jurisdiction of the courts nor confers finality on the administrative action, yet the finality of the administrative action may be inferred by necessary implication. Such inferences may be drawn when the statute is a self contained code which gives a right and also provides a machinery for the vindication of such right.

Statutory provisions, In general cannot take away the right conferred by the Constitution. So ouster clauses cannot take away the jurisdiction of the Supreme Court and High Court under Arts.32, 136, 226 and 227 of the Constitution. But the right of a person to seek ordinary remedies is considerably curtailed by the Ouster clause.

Supreme Court had occasion to consider the scope of ouster clause in many cases. ***In Secretary of State V. Mask and Co.,*** the Supreme Court laid down a general proposition that the jurisdiction of the court could not be excluded where the provisions of particular Act had not been complied with or the statutory tribunal had not acted in conformity with the fundamental principles of judicial proceeding. In ***Dhula Bhai V. State of Madhya Pradesh,*** the Supreme Court laid down the following proposition on the question of exclusion of the courts jurisdiction : (i) Where a statute provides that the administrative orders are final the courts would regard that the jurisdiction of ordinary courts is excluded if there is an adequate remedy to do what the courts would have done in such a suit. (ii) Where the statute does not expressly

say so the intention of the legislature has to be ascertained. This will involve an examination of the remedies provided under the statute as well as its scheme. (iii) the validity of the provisions of a statute has to be challenged before a tribunal created by the same statute, and (iv) where a provision of a statute is already declared to be unconstitutional, a suit will lie. In this case the Supreme Court upholding the maintainability of a civil suit in the face of the finality clause held that it is not the implication of the finality clause that the void laws be enforced without any remedy.

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This ouster clause or finality clause does not bar the jurisdiction of the courts if the action is ultra vires of the powers of the administrative authority. In other words the ouster clause only protected errors committed within jurisdiction. No hard and fast rule have been laid down to decide whether an errors is within the jurisdiction or outside the jurisdiction. It always depends upon the attitude of the judges.

6.11 DOCTRINE OF ESTOPPEL

Estoppel is a rule whereby a party is exclude from denying the existence of some state of facts which he had previously asserted and on which the other party had relied or is entitled to rely. This rule of estoppel is dealt with in sections 115 to 117 of the Indian Evidence Act. The basic Principle is if a man admits a fact he is estopped from proving the contrary.

Section 115 reads as follows :- When one person has by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative to deny the truth of that thing.

A, intentionally and falsely leads B, to believe that certain land, belongs to A and thereby induced B to buy it. The land afterwards becomes the property of A and A seeks to set aside the sale deed on the ground that at the time of the sale he had no title. He must not be allowed to prove his want of title.

The question to be considered is the administration bound as an ordinary citizen would be, when someone acts upon the assurance made by it. In other words, is the administration estopped later on from retracting promises it has made? As a general rule, the government is usually not bound by representations which may have been made on its behalf even though a private individual in a similar situation be bound.

The rationale of the rule of non-availability of estoppel against the state is that it is the legislation which prescribes the law and not the official who has no right to modify the provisions of a statute. Our Supreme Court has consistently adopted

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the view that no estoppel is available against the government in the matter of operation of a statute. *In Amar Singhi V. State of Rajasthan*, the collector had given an assurance that the jagir of the petitioner would not be acquired by government during his life time under the Rajasthan Land Reforms Act, 1952. Since this assurance was in clear violation of the provisions in the Act, the Supreme Court refused to apply the doctrine of estoppel against the government. It is also well settled that estoppel cannot be applied when the government is exercising a constitutional or legislative power. Application of the doctrine of estoppel was considered by the Supreme Court in ***Sankaranarayan V. State of Kerala.*** In this case the government raised the age of retirement of its employees through a notification under Art. 309 of the Constitution of India. It was contended by the petitioner that the government was estopped from lowering the retirement age through subsequent notification. Negativing the contention the Supreme Court held that the power conferred by Art. 309 could not be curtailed by applying the doctrine of estoppel. So also the legislative power of the State could not be abridged by agreement or by estoppel.

But in some cases court relaxed the rule on equitable grounds. ***In Century Spinning and Manufacturing Co. V. Ulhas Nagar Municipality,*** the municipality agreed to exempt existing industrial concerns in the municipal area from octroi duty for a period of seven years. Many industrial concerns expanded their business relying on this representation. But contrary to the assurance the municipality sought to impose octroi duty before the expiry of seven years. The Supreme Court held that where a private party has acted upon the representation of a public authority it could be enforced against the authority on the ground of equity in appropriate cases even though the representation did not result in a contract owing to the lack of proper forum.

The doctrine of promissory estoppel is not realty based on the principle of estoppel, but it is a doctrine evolved by equity in order to prevent injustice. For attracting the doctrine of promissory estoppel, it is necessary that the promisee should have altered his position relying on the promise. It is not necessary that he should suffer a detriment.

Supreme Court considered the application of promissory estoppel against government in ***Motilal Padampet Sugar Mills V. State U.P.*** In this case the respondent, State Published in the newspaper on Oct. 10, 1968 that it had decided to give exemption from sales tax for a period of 3 years under S. 4A of the U.P. sales tax Act to all new industrial units in the State. On Oct. 11, 1968 the appellant company wrote to the Director of Industries that it desired to set up a plant for the manufacture of vanaspathi and sought a confirmation of the exemption. The Director of Industries

confirmed the position of exemption. The same assurance given by Chief Secretary, U.P. also. On the basis of the assurance the appellant went ahead with the Work. The appellant's factory went into production on July 2, 1970. The State government changed its policy in August 12, 1970 and intimated its decision to rescind the concessions. Aggrieved by this the management of Vanaspathi industry moved_the High Court to quash the order of the government on the ground a promissory estoppel. The High Court dismissed the writ and rejected the plea of promissory estoppel against the government. The matter went on appeal to Supreme Court. The Supreme Court allowing the appeal held that where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in future, knowing or intending that it would be acted upon by the other party to whom the promise is made, and it is in fact so acted upon by the other party the promise would be binding on the party making it and he would not be entitled to go back upon it. If it would be inequitable to allow him to do so having regard to the dealings which have taken place between the parties and this would be so irrespective of whether there is any pre-existings relationship between the parties or not. Of course the basic requirement for invoking the principle must be present, namely that the factual situation should be such that injustice can be avoided only by the enforcement of the promise.

The doctring of promissory stopped is an equitable doctrine it must yield when equity so requires. The doctrine of promissory estoppel cannot be availed to permit or condone a breach of law. The doctrine cannot be invoked to compel the government or a private party to do an act prohibited by law.

In India, the doctrine of promissory estoppel has not only been adopted in its fullness but it has also been recognized as a measure affording a cause of action to the person to whom the promise has been made by the public authority. The rule of estoppel has also been applied against the government and the defence based on executive necessity has not been accepted.

The High court of Calcutta applied the doctrine of promising estoppel and recognised a cause of action founded upon it in **Gangs mfg.Co.V. Sourujmul.** Similarly, the doctrine was also applied against the government by the High court of Bombay in municipal corporation, **Bombay.V.Secretary of state.**

Reiterating the principal of promissory estoppel as applicable to public authorities the supreme court held that were authorities had been making representation to assesses that purchase tax on milk had been abolished and

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Check Your Progress Questions

4 Describe the Party System of U K

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consequently the purchaser-assesses had passed on exemption benefit to milk producers estoppel will arise against the government.

State of punjab.V.Nestle India Ltd. (2004) 6 SCC 465.

In this case the finance minister in his budget had made a representation that the state government had abolished purchase tax on milk. However, after the assessment was over the government decided not to abolish tax on purchase of milk. Explaining the principle, the court elaborated that though the court cannot rely on a representation made without complying with the procedure prescribed by relevant statute, but a citizen may and can compel the government to do so if factors necessary for founding a plea of promisory estoppel are established. Such a position would not, the court said, "fell foul of constitutional scheme and public interest.

It is also settled law that the doctrine of promissory estoppel applies in case of written and unwritten government contracts even though the requirements of Articles 298 and 299 of the constitution are not satisfied.

State of Orissa.V. Manglam Timber product Ltd, (2004) 1 SCC 39 .

In this case assurance was extended but subsequently it was curtailed. It was held that it would attract promissory estoppel against the government . it is, therefore, that when the government revised the terms of contract from a back date to the detriment of the other party, the principle of promissory estoppel would apply because the party could not revise its price from back date and recover the amount from the purchase to whom goods were sold at a fixed price.

6.12 SUMMARY

We have already seen that one of the draw back of administrative decision making is lack of uniform procedure. So different tribunals followed different procedure formalities. But the courts insisted that the administrative agency must follow minimum of fair procedure. The minimum fair procedure refers to the principles of Natural justice. The requirement of minimum procedure of Natural Justice cannot be precisely defined. They depend upon the circumstance of each case. Natural justice refers to the minimum procedural principles developed by judges to be followed by administrative agencies when they are performing a judicial function, this minimum procedural requirement consists of two important principles. Which was already discussed. And who had seen meaning of Resjudicate, stare decisis, Doctrine of ultravires and Doctrine of estoppel also. Hence read all the definitions of the terms thoroughly with the help of decided cases.

6.13 KEY WORDS

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Impartial	-	Free from Bias
Deliberate	-	consider carefully
Pecuniary	-	Relating to money
Bias	-	Interest
Condone	-	Pardon.

6.14 ANSWERS FOR CHECK YOUR PROGRESS QUESTIONS

For	Question No.1	...	Refer Section No. **6.5**
	Question No.2	...	Refer Section No. **6.5 (i)**
	Question No.3	...	Refer Section No. **6.5 (ii)**
	Question No.4	...	Refer Section No. **6.5**
	Question No.5	...	Refer Section No. **6.7**

6.15 MODEL QUESTIONS

A. Short answer questions

1. Doctrine of Estoppel –write short notes
2. Doctrine of Ultravires – give short answer.
3. Explain Resjudicata

B. Long answer questions

1. Examine the different types of bias known to Administrative law.
2. What do you understand by the maxim "Audi Alteram Partem? Examine the scope of its applicability in Administrative adjudications.
3. Bring out with the help of decided cases, the essential ingredients of fair hearing. When is post decisional hearing considered sufficient?

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UNIT –7

JUDICIAL CONTROL OF ADMINISTRATIVE ACTION

INTRODUCTION

Prerogative remedies are provided through writs. Provisions for prerogative writs have been made under Article 32 and 226 of the Constitution of India. As has already been stated, the supreme court and the High Courts have power to issue prerogative writs in the nature of habeas corpus, Mandamus, prohibition, certiorari and quo-warranto.

The five writs specifically mentioned in Articles 32 and 226 are known in English law as prerogative writs, for they had originated in the King's prerogative power to superintendence over the due observance of law by his officers and tribunals. The prerogative writs are extra-ordinary remedies intended to be applied in exceptional cases in which ordinary legal remedies are not adequate. Thus the Supreme court and High courts have power to grant the remedy of the nature obtainable in the court of king's Bench in England by means of the prerogative writs.

The control mechanism of the judiciary. Whether it is administrative action or action of any other authority depends upon its review power. This branch of law has been developed by the judiciary through its decisions.

The review mechanism can be classified into two groups they are

(i) public law review – it is exercised through writs under Art 32 and 226 and Articles 136 and 227 and

(ii) Private law review – it is exercised through suits for damages, injunctions and declaratory actions.

OBJECTIVES

- To analyse the term of public law review and private law review.
- To know the meaning of writs and types of writs.
- To discuss how to file a writ application? And against whom writ can be issued.
- To study the meaning of Locus Standi and Alternative remedy.
- Finally to discuss the public interest litigation.

UNIT STRUCTURE

7.1 Public Law review

A. Against whom writ would lie

7.1.1. Authorities amenable to writ jurisdiction of the supreme court.

7.1.2. Authorities amenable to the writ jurisdiction of the High courts.

B. · Locus Standi to challange administrative action.

C. Discretion in the area of public law review

(i) Laches or unreasonable delay

(ii) Alternative remedy

(iii) Resjudicata

7.2. Types of writs

7.2.1. Habeas corpus

7.2.2. Mandamus

7.2.3. Quo warranto

7.2.4. Prohibition

7.2.5 Certiorari

7.3 Supervisory power of the High courts

7.4 Special leave to appeal under Article 136

7.5 Public Interest Litigation

7.6 Summary

7.7 Keywords

7.8 Answers to check your progress.

7.9 Model questions.

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7.1. PUBLIC LAW REVIEW :

This control is exercised through writs. The important writs are : (1) Habeas Coupus (2) Mandamus (3) Prohibition (4) Certiorari and (5) Quo warranto.

You must know that these writs can be issued by the Supreme Court under Article 32 for enforcement of the fundamental rights guaranteed under part III of the Constitution. Under Article 226 High Courts can also issue these writs for enforcement of fundamental rights and other Constitutional rights (e.g. rights to property under Art. 300-A, Right to trade, commerce and intercourse under Art.311 etc.)

A) Against whom writ would lie :

Ordinarily a writ would lie against the state and statutory bodies and persons charged with public duties. Though private persons are not immune from the writ jurisdiction of the supreme court as well as of High courts, issuance of a writ to them would require exceptional circumstances.

Check Your Progress Questions

1 What in meant by Public Law Review?

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As a general rule, a writ can be issued against parliament and legislature of states, central and state Governments, all local authorities and other authorities.

Rajastan State Electricity Board.V. Mohan Lal is the leading decision wherein the Supreme court interpreted the expression "other authorities" in Article 12 liberally. The law developed very fast thereafter and a number of authorities were held to be "state" within the meaning of Article 12.

7.1.1. Authorities amenable to writ jurisdiction of the Supreme Court:

Under Art. 32 Supreme Court is empowered to issue the writs or any other direction for the protection of the fundamental rights. This fundamental right may be infringed by the 'State'. The concept of 'state' is defined in Art. 12. So the different agencies coming within the definition of state as given Art. 12 are amenable to the writ jurisdiction of the Supreme Court. Supreme Court also gave wider Interpretation to the term other authorities coming in Art. 12, so that different agencies controlled by the government may be subject to writ jurisdiction.

7.1.2. Authorities amenable to the writ jurisdiction of the High Courts

The High courts have a wider power to issue writs against any 'person or authority' for the enforcement of fundamental rights and any other legal right. The writ of habeas corpus and quo warranto can be issued even against private individuals and public office respectively. The Supreme Court ***in State of M.P.v Babulal*** held that a writ of certiorari can be issued against a court to correct the record if the court has usurped the jurisdiction. Apart from agencies coming within the purview of Art. 12, even private colleges affiliated to the University, Airport Authority and registered societies are also held to be amenable to writ jurisdiction of High Courts.

B. Locus Standi to challenge administrative action:

The term 'Locus standi' means right to move the court. The traditional rule is that the right to move the court is available only to those whose rights are infringed. This rule was strictly followed by the courts in the writ proceedings (except habeas corpus and quo warranto) as well as for civil law remedies Art. 32 and 226 do not prescribe persons or class of persons who may seek writs for redressal of grievances against the administration. Thus the matter of locus standi lies within the discretion of the courts. The courts have not exhibited uniform or consistent attitude on this question. In some cases, they have adopted a restrictive, while in other cases, a liberal attitude.

The traditional rule of locus standi has been that a petition for a writ of certiorari, prohibition, mandamus can ordinarily be moved only by an aggrieved

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person. This principle is based on the theory that remedies and rights are correlatives and therefore, only a person whose right is in jeopardy is entitled to seek a remedy.

This narrow view of the law leads to several consequences. (i) In some cases there may not be anyone having standing to challenge an administrative action and thus the concerned administrative authority may happily continue its wrongful action without fear of anyone challenging its action in the court. Thus public injuries resulting in mass suffering may remain unredressed because none has standing to seek judicial remedy. Eg. an administrative action resulting in pollution of the air, (ii) in a country like India, because of poverty, ignorance, illiteracy, the poor are unable to seek redress of their grievances. They are unable to seek access to the courts not because the door of the courts are technically closed to them, but because they themselves are not financially able to do so, and therefore they continue to suffer the wrong.

Any person can file a writ of Habeas Corpus to get the release of a person under illegal detention, public or private. A writ of quo warranto can be filed by any person to challenge the appointment of a person to a public office, whether or not he has a personal interest in it. So fan as writs of mandamus prohibition and certiorari are concerned, only the persons whose rights have been infringed can apply for the writ. But this rule has been very much liberalized. It is visible from the observation of ***Bhagawati J in S.P. Gupta v. President of India.*** "Where ever there is a public wrong or public injury caused by an act or omission of the state or a public authority which is contrary to Constitution or the law, any member of the public acting banafide and having sufficient interest can maintain an action for redressal of such public wrong or public injury. The strict rule of standing which insisted that only a person who has suffered a specific legal injury can maintain an action for judicial redress, is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere lazy-body of meddlesome interloper but has sufficient interest in the proceeding." The acceptance of public interest litigation as a legitimate method to seek judicial remedies against public authorities has practically made conventional approach to locus standi irrelevant. In large number of recent cases the Supreme Court and various High Courts have allowed petitions filed by voluntary organizations, lawyers, journalists and social workers to Indicate the rights of the poor, weak and exploited sections of the community.

c. Discretion in the area of public law review

The power of the Supreme Court under Art. 32 and the High courts under Art. 226 for the enforcement of fundamental rights is mandatory. But the power of review of the High Court under Art. 226 for any other purpose, is discretionary. This discretion is also not unguided one. In exercising the discretion the court has to follow the following principles:

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(i) Laches' or unreasonable delay: The court may refuse the remedy if there is unreasonable delay in invoking the jurisdiction of the court. But there is no fixed period for laches. Every case will be determined on its own merit.

State of Rajastan.V. Laxmi

The Supreme court stateol, "Though the order may be laid, if the partly does not approach the court within reasonable time, which is always a question of fact and have the order invalidated or acquiesced or waived, the discretion of the court has to be exercised in a reasonable manner. When the direction has been conferred on the court, the court may in appropriate case decline to grant the relief, even if it holds that the order was void.

The real difficulty is about the measure of delay. Since the Limitation Act does not apply to writ petitions and no period of limitation is prescribed by the constitution to move the Supreme court under Article 32 of High Courts under Article 226 the matter is 'more or less' left to judicial discretion.

In Narayani Devi .V. State of Bihar

Speaking for the supreme court Gajendragadkar, C.J. Observed: "No hard and fast rule can be laid down as to when the High court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay and is otherwise guilty of laches. That is matter which must be left to the discretion of the High court and like all matters left to the discretion of the court in this matter too discretion must be exercised judiciously reasonably."

In Tilokchand Motichand.V. H.B.Munshi, Hidayatullah, C.J.Observed;

The question is one of discretion for this court to follow from case to case. There is no lower limit and there is no upper limit. A case may be brought within Limitation Act by reason of some article but this court need not necessarily give the total time to the litigant to more this court under Article 32 similarly, in a suitable case this court may entertain such a petition even after a lapse of time. It will all depend on what the breach of the fundamental light and the remedy claimed are and when and how the delay arose."

Thus, while on the one hand, writ petitions field within the 'period of limitation' prescribed for a civil action for the same remedy may be dismissed on the ground of delay and laches, and on the other hand, a court may entertain a petition even after 'the period of limitation'.

(ii) Alternative remedy: The general principle Is that the Supreme Court and High Court can not refuse relief under Art. 32 and 226 on the ground of alternative

remedy if the person complains of isolation of his fundamental rights. But if the person invokes the jurisdiction of the High court for any other purpose in exercise of its discretion the High court may refuse relief. ***In A.V. Venkataswaran v.R.S. Wadhwani,*** the Supreme Court observed that the rule of exhaustion of alternative remedy is not one that bars the jurisdiction of the court, but it is a rule which courts have laid down for the exercise of their discretion. If the alternative remedy is either not adequate, or was lost for no default of the person, or is illusory or involves delay, the High court may grant relief.

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It is worth mentioning that 42nd Amendment Act 1976 had absolutely barred the jurisdiction of the High Court in all cases where alternative remedy is provided by or under any other law except in the case of enforcement of fundamental rights. But this amendment has been repealed by Constitution 44th Amendment Act, 1978.

It is submitted that the following observations of **Das, C.J.** in the leading case of **State of U.P. V. Mohd. Nool** lay down the correct position of law;

"That fact that the aggrieved party has another and adequate remedy may be taken into consideration by the superior court in arriving at a conclusion as to whether it should, in exercise of its discretion, issue a writ of certiorari to quash the proceedings and decisions of inferior courts subordinate to it and ordinarily he superior court will decline to interfere until the aggrieved party has exhausted his other statutory remedies, if any. But this rule requiring the exhaustion of statutory remedies before the visit will be granted is a rule of policy. Convenience and discretion rather than a rule of law."

(iii) Resjudicata : If a petition has been heard and finally dismissed the same petition on the same ground cannot be filed in the same court again. The principle of resjudicata also applies in cases for the enforcement of fundamental rights.

7.2 TYPES OF WRITS

1. Habeas corpus
2. Mandamus
3. Quowarranto
4. Prohibition and
5. Certiorari

7.2.1 Habeas Corpus : It means produce the boby. Corpus means body. When a person is detained by an authority and his existence itself is questionable, this writ is resorted to. When the writ is issued, the person detained will, have to be produced

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before the judicial authority (High Court or Supreme Court which issued the writ) to be dealt with according to law. The Court will examine the legality of detention and set him free if he is detained illegally.

This writ can be asked for as a matter of right by the person detained or his relatives or friends. This writ can be issued by the High Court under Art. 226 and the Supreme Court under Art.32. This writ has been extensively resorted to for enforcement of fundamental right under Art. 21. ***A.K. Gopalan v. State of Madras***, (1950). This remedy cannot taken away by the presidential order under Art.359 during the emergency. The leading case on this point is ***A.D.M. Jabalpur v.Shukla*** (1976). But this case is before the 44th Amendment.

The Court will examine the validity of the detention on the date of filling the writ. For filling a writ of habeas corpus actual physical confinement is not necessary. It is sufficient if some kind of control or restraint is exercised over the person. In the case of a child if it if kept away from the custody of the person entitled to the custody is sufficient for issuing this writ. (**Basalingam** - v - **Lakshmi**)

This writ will lie against a private individual where a person wrongfully detains another (or a child). In this connection you must know that as against a private person only the High Court under Art. 226 can issue this writ; Supreme Court under Art. 32 can issue this for enforcement of fundamental right against the State or an authority under the State.

The Court may take oral evidence to confirm the petitioner's averment that the person (the son) has been in fact taken to police custody - ***e.g. Eacharawariar v. State of Kerala,*** 1977, ("The Rajan case"). In that case he could not be produced before the Court because he was no more.

The recent development in the writ jurisdiction under the title of public interest litigation, has its impact on habeas corpus petition also. Example, **Sunil Batra v.Delhi Administration,** 1978. In this case a life convict's letter informing that another prisoner has been tortured in the jail, has been treated as a writ of habeas corpus.

The last point that you have to remember is that the principle of res judicata is not applicable to habeas corpus writ. Where the application (under Art. 226) is dismissed before the High Court, you can try before the Supreme Court under Art, 32 and vice versa.

(i) Habeas corpus and Emergency powers of executive

Article 359 empowers the president to suspend the right to move any court for the enforcement of any of the fundamental Rights conferred by part III of the constitution **in Mohan Choudhary V. Chief commnr. AIR 1964 SC 173.**

The Supreme court rejected the detenu's petition under Article 32, on the ground that it was barred by the presidential order declaring the emergency.

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In Makhan Singh.V. State of Punjab

The Supreme court held that it cannot issue a writ of habeas corpus to set at liberty a person detained under the Defence of India Act, 1962 even though his detention was not in accordance with the fundamental Rights guaranteed under the constitution. However, presidential order does not debar the jurisdiction of the court to decide as to whether the order of detention was under the Defense of India Act 1962 or Rules framed these under. It is also open to the petitioner to contend that the order was malafide or invalid and in either of the cases, he was entitled to move the court for setting aside the order of detention.

7.2.2 Mandamus

Mandamus is a Latin term which means 'we command' mandamus is a judicial order issued in the form of a command to any constitutional, statutory, or non-statutory authority asking to carryout a public duty imposed upon them by law or to retrain from doing a particular act which the authority is not entitled to do under the law. It is one of the most useful writ in checking the arbitrariness in administration and the non-exercise of the functions by the Government. This writ plays a very important role in correcting the irresponsible official actions. It gives a positive (to do) as well as negative(not to do) remedy whenever justice is denied or delayed, thereby it covers the purpose of almost all other writs. Thus this writ is popularly called as 'writ of justice'.

Historical Development

This writ was first introduced in India in 1773 by the letter patent, when the Supreme court was created in Calcutta. In 1877 the writ of mandamus was removed and an order in the nature of mandamus, to enforce public duty, was provided in the Specific Relief Act, 1877. Again the writ was reintroduced in 1950 through the Constitution. The Specific Relief Act, 1963 which replaced the earlier Act of 1877 has omitted the provision dealing with order in the nature of mandamus.

(A) Locus Standi

The Laws Standi rule is strictly applicable, (except in public interest matters) so as to speak the remedy of mandamus, the petitioner must prove that he has a legal right to enforce the performance of the public duty in his favour. But in the public interest matters the petitioner need not have any right in the public duty claimed to be performed.

Check Your Progress Questions

2 What are the conditions for the grant of mandamus?

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(B) Authorities Amenable to this writ

This Locus of mandamus may be issued against government, Semi-government, and all public authorities, judiciary, tribunals, statutory corporations, non-statutory bodies, universities, principal of a private college, affiliated to a university in the matter of exercise of this power under the university rules. In short it is available against all kind of administrative authorities.

(C) Conditions for the Grant of Mandamus

(i) There must be a public Duty : A public duty means a duty created by the constitution, statute or by common law. Where a citizen has a legal right to claim certain things from the administration there arises the publicity. On the party of the authority to perform such duty and recognise the right of the citizen. The legal right and public duty are just like the two sides of the coin. Mandamus will be issued only to enforce public duties. A duty which is private in nature or arising out of contract cannot be enforced through mandamus.

In I.T Commer.V. State of Madras (AIR 1954 Mad 24) The court refused to issue mandamus where the petitioner wanted the government to fulfill its obligations under a contract entered with the petitioner.

In Gujarat State Financial Corporation. Vs. Lotus Hotels Pvt.Ltd. (AIR 1983 SC 848). The corporation entered into an agreement with the lotus Hotel to provide credit for construction of a hotel. The agreed fund was not released by the corporation. The Gujarat High court issued a writ of mandamus against the corporation to perform its obligation under the contract because contract between the corporation and the company had a statutory flavour, and was not a contract simplifiers. On appeal the High court's decision was affirmed by the Supreme court. (the court invoked promissory estoppel also against the corporation).

(ii) The public Duty must be an Absolute Duty : Absolute duty means a duty which is mandatory in nature. Mandamus will be issued to enforce mandatory duties, but it may not lie to enforce discretionary duties. But, when discretionary power is granted to an authority which refuses to exercise the discretion the writ of mandamus may be issued to compel the authority to exercise of discretion. When the discretionary power is abused or improperly exercised than also it will be treated as non-exercise of discreation and the writ of mandamus may be issued to compel the authority to exercise the discreation properly in accordance with law.

In Manjula manjari.V. Director of Public Instruction (AIR 1952 SC 344)

The petitioner, a publisher of books, applied for mandamus to compel the respondent to include her book in the list of books approved for selection for schools.

Mandamus was refused by the Orisa High court because the power conferred to the Director of public Instruction to select good books was a discretionary function and the Director has no public duty to select the petitioner's book nor the petitioner has any enforceable legal right against the respondent.

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(iii) There must be specific Demand and Refusal : For seeking the remedy of writ of mandamus to perform a public duty, one must prove that he was made a specific demand to the concerned authority for the performance of that duty, and the authority has specifically refused to perform the duty such demand and refusal need not be in express terms but it can be implied also. This requirement affords an opportunity to the concerned authority to consider the demand and perform the duty which it is legally bound to perform even after the demand if the duty remains un discharged mandamus be can be sought by the aggrieved.

In Naubat Raj.V.Union of India (AIR 1953 pun 137)

Mandamus to direct the government to re-appoint the petitioner was refused by the court because after the dismissed of the petitioner from military service he never applied (or) demanded for his reinstatement to concerned authorities in the defense department.

The demand and refusal condition is not a strict rule.

(iv) Grounds on which the writ may be issued : Mandamus may be issued on the following grounds :

(a) That the authority has exceeded the limits of the power conferred

(b) That the order was passed by the authority under the influence of extraneous considerations.

(c) The discreation is abused in an unjust manner. Abuse of discreation may arise in the following cases.

   (i) Official victimisation.

   (ii) Exercise of power for undesirable ends.

   (iii) Exercise of power recklessly in difference to private interests.

   (iv) When it is exercised on considerations irrelevant to the purpose of the Act.

In the above three cases it will be deemed that the authority has failed to exercise its discretion and mandamus will be issued to compel the authority to act in accordance with law.

(d) Violation of statutory provisions.

(e) Malafide exercise of power.

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(v) The writ will not lie in the following cases : The writ of mandamus **cannot be issued** against the following persons and functions.

a. Against the president of India and the Governors to perform the duties of their office.

b. To a legislative body either to enact or nor to enact a law.

c. Against any officer of the parliament or the state legislature whose power is to regulate procedure. Conduct of the business, or maintaining the order of the house.

d. It will not lie to enforce a judicial function.

e. For enforcing a contractual obligation even if the other party to the contract is a state (subject to certain exception).

f. Against private individuals, companies, corporation and trade union, unless they act under same public authority.

g. Against persons involved in election process, the remedy against them is only election petition before the proper authority.

h. If the issue of the writ is fulfilled (i.e) it serves no purpose or something which is impossible to perform or infructuous.

i. To enforce administrative directions which do not have the force of law or to enforce a ministerial duty.

j. When it is asked in anticipation of injury (there are exceptions to this rule)

In the modern era, extensive discretionary powers are being conferred on administration and the question of judicial control of those functions is a burning problem of the administrative law today. The writ of mandamus serves as one of the powerful weapon in checking the arbitrariness, in administrative action and to give appropriate remedies to the aggrieved citizens.

7.2.3. Quo Warranto

This writ is issued by the Supreme Court of High Court against a person who occupies a public office enquiring under what authority he occupies that post. In other words when an unqualified person usurps a public office this writ, on the application of the person aggrieved, is issued to explain whether he is qualified (eligible) and entitled to continue in the post.

When the writ is issued, the occupant of the public office has to explain that he is qualified and entitled to the post. This point is decided by the Delhi High Court

in the famous **A.N.Ray's** case wherein the appointment of Chief justice of India was in question, **(Lakhanpal v. A.N.Ray, 1975)**.

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1. The office (post) challenged must be public office including judicial but not private. This point has been discussed by the Supreme Court in **University of Mysore** v. **Govind Rao.**
2. The office must have been created by the constitution or by any other law. And the office must involve duties of public nature.
3. The office must be permanent in Character, not terminable at will. For the purpose of quo warranto the post of Governor, President and ministers are all deemed to be permanent offices.
4. The person whose appointment challenged must be the actual occupant of the office.
5. Mere irregularity in appointment is not a ground. The appointment must be made in clear violation of law.

Any citizen deemed to be interested in the appointment made to a public office can apply for the writ. He need not be the actual aggrieved party, **U.N.R. Rao v. Indira Gandhi.** In this case the applicant for the writ was an advocate (Mr. U.N.R. Rao) in Madras.

Last point that you must remember is that this writ can not be claimed as a matter of right. It is a discretionary writ and can be refused on appropriate grounds. If the person, whose office is challenged, is found not eligible(qualified) he has to vacate the office.

7.2.4. Prohibition : This writ is issued by the Supreme Court or High Court to an inferior court or a tribunal preventing it from proceeding further in a matter in which it has no jurisdiction but has assumed jurisdiction unlawfully. You must note that this writ will issue only against inferior courts or quasi-judicial authorities (tribunals), and the same has usurped the jurisdiction with which it is not legally vested. It will not issue against an administrative authority. Besides, this writ is issued only when the matter is pending and before a final decision is given.

7.2.5. Certiorari : The writ of Certiorari is also issued on the same grounds of unlawful usurpation of jurisdiction by judicial or quasi-Judicial authority (Tribunals) but after the final decision is given.

Check Your Progress Questions

3. Writ of Certiorari – write short answer.
4. Distinguish between a writ of certiorari and a writ of prohibition.

The difference between prohibition and certiorari lies as the stage at which the writs are issued. If the matter is pending, prohibition is issued and after the decision is given, certiorari is issued. In all other respects both are same. Certiorari

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is issued by the Supreme Court or High Court to subordinate court or tribunal which usurped jurisdiction with which it is not legally vested and a decision has been given by the wrongful exercise of jurisdiction. The effect of this writ is to call for the records and quash the proceedings if the decision has been given without or in excess of jurisdiction.

It is interesting to note that the Supreme Court has found in **Kraipak v. Union of India 1970,** that the dividing line the between Quasi-judicial and administrative function is thin and vanishing.

You must note that the writ of certiorari is issued against the proceedings or records. All that is necessary is that though tribunal which gave the decision has become functus officio the records must be available in proper custody. **In Hari Vishnu v. Syed Ahmed,** 1955, though the quasi-judicial authority which passed the order (the Election Tribunal) has ceased to continue (functus officio) the Supreme Court issued the writ of certiorari.

Grounds

1. Absence of jurisdiction: Sometimes the tribunal may have jurisdiction for a particular purpose, but tribunal may exceed the limit of jurisdiction. In such cases also both prohibition and Certiorari will lie.

2. Error of law apparent on the face of the record. The error must be a self evident one. (**Batuk** v. **Surat municipality**), This is one not requiring a long process of reasoning, lengthy and complicated arguments - **Sathya Narayana v. Malkarjun,** (1960). A taxing authority making an assessment on mere guess work and suspicion without any basis-**Dhakeswari cotton mills v. Commissioner of Income tax, 1995.** Where a tribunal acted upon an alleged admission but the records showed that it was a denial.

3. Violation of principles of natural justice: This is an important ground under which the two writs are issued. Violation of principles of natural justice are found in (1) Rule against, bias and (2) Rule of fair hearing.

Subsequent disqualification is not a ground for issue of this writ. The question is whether the person is qualified on the date of appointment. Being a discretionary remedy, this writ will not be issued if there is an adequate alternative remedy, or the issue of the writ will be futile.

Article 32 itself a fundamental right: It is already discussed that under Articles 32 and 226 the above mentioned writs can be issued by the Supreme Court and the High Courts respectively. In this connection you must note one more point, namely

because Article 32 comes in part III (dealing with fundamental rights) it is also a fundamental right.

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7.3. SUPERVISORY POWER OF THE HIGH COURTS

Under Art 227 the High Court may quash the order of any inferior Court or tribunal but not to issue further directions. Further the supervisory jurisdiction (including the power of interests) is limited to tribunals functioning within the limits of authority. In this respect High Court does not act as the appellate tribunal, its power under Article 227 is limited. It may not exercise its power if an alternative remedy is available.

The High Court may interfere if the tribunal has acted without or in excess of jurisdiction, refused to exercise its jurisdiction, acted in violation of principles of natural justice committed an error visible on the, face of the records, acted arbitrarily and in the like circumstances.

7.4. SPECIAL LEAVE TO APPEAL UNDER ARTICLE 136 :

Art. 136 deals with power to grant special leave (permission) to appeal against any judgement, decree, determination, sentence or order in any matter made by any court or tribunal. This is purely a discretionary power conferred on the Supreme Court, yet the jurisdiction under this Article is very vast, therefore, it is considered to be a lawyer's paradise. The power of Supreme Court to grant special leave of appeal would include any order passed in any matter by any tribunal.

Because this is an extra-ordinary remedy, unless the applicant convinces the Court with some special circumstances the Court will not grant special leave to appeal. Therefore under normal circumstances, the leave is refused. Pure administrative decisions of legislative bodies are outside the purview of this exceptional jurisdiction. A question which was not raised before the tribunal cannot be raised before the Supreme Court unless it is a matter of law.

The following are some of the instances in which the Court may grant special leave to appeal 1) Where the tribunal has acted in excess of jurisdiction. 2) failed to exercise jurisdiction, 3) acted illegally; 4) an error apparent on the face of the record, 5) violation of the principles of natural justice, 6) the decision is erroneous, 7) the decision of the tribunal raise a question of law.

7.5 PUBLIC INTEREST LITIGATION

7.5.1 Introduction

Public Interest litigation means a social action which is initiated before the court of law for the purpose of enforcement of general public interest.

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Initially PIL was considered as a strategy to enable public spirited as a strategy to enable public spirited citizens and social activists to mobilize favorable judicial concern on behalf of the victimized and oppressed groups. It has become today a powerful weapon of the judicial activism for involvement in social political and economic affairs of the society.

7.5.2. Nature and scope

The Supreme court and High courts have widely enlarged the scope of PIL by relaxing and liberalising the sale of standing by treating petitions and 'Letters' not only by the persons or person who can be said to be 'aggrieved' or 'adversely' affected in the strict sense of the term by the action or omission by the respondents but acting **pro Bono publico**. The acceptance of post-card litigation has regulated in rapid growth of public interest litigation since many issues of public importance could be presented to the courts without incurring heavy legal expenditure. However a public interest litigant cannot choose his forum. If matter is transferred to the Supreme court, litigant has to make his appearance before it.

7.5.3. Object

Public interest litigation is a challenge and an opportunity to the Government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice which is the signature tune of our constitution. In public interest litigation, the role held by the court is more assertive than in traditional actions, it is creative rather than passive, and it assumes a more positive attitude in determining facts.

7.5.4. Justification

In India, this new class of litigation is justified by its protagonists on the basis generally of vast areas in our population of illiteracy and poverty, of social and economic backwardness, and of an insufficient awareness and appreciation of individual and collective rights. These handicaps have denied millions of our countryman access to justice. PIL is said to possess the potential of providing such access to justice to the millions of persons who belong to the weaker section of society. In the result the legal organisation has taken a radically new dimension and correspondingly new perspectives are opening up before judges and lawyers and state law agencies in the tasks before them.

Check Your Progress Questions

5. What is PIL? Explain Nature and scope.

7.5.5. Constitutional Concept :

What is to be noted is that in PIL the court is not exercising any extra constitutional jurisdiction. Such strategy is firmly rooted in Articles 14 and 21 of the

constitution. Art 14 contains the principles 'reasonableness' which is anti thesis or arbitrariness and lawlessness in administrative action.

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Art 21 for protection of 'life' which embodies everything which is necessary for dignified living including rightful concerns for other persons. It also encompasses violations of various directive principles of state policy in the constitution which have been designed for the welfare of the weaker sections of the society. Proceedings are initiated in PIL under Art 32 and 226 of the constitution.

7.5.6. Locus Standi

Traditional view of 'Locus Standi' was that an aggrieved person who has personally suffered legal injury by reason of violation of his rights or legally protected interest can file a suit for redress of his grievance. This was highly restrictive and individualistic view of Anglo-Indian legal system which did not suit to the needs of present day society and as such the phase has been liberally interpreted in the field of PIL to allow standing to any **pro bono publico**. Thus interpreted the sale of 'Locus Standi' has been made broad-based and people-oriented to allow access to justice through 'class actions', representative actions and 'public or social action litigation' so that justice may be easily available to the lowly and lost. The scope of 'Locus Standi' is no more confined to private injury but it has been extended to public injury. Standing is given to public –spirited individuals and social activist to initiate proceedings in the court of law on behalf of those who on account of their poverty, illiteracy and ignorance cannot come before the court and thus continue to suffer injustice and deprivation.

Wade and Schwartz have supported liberalization of locus Standi by stating that "restrictive rules about standing are in general inimical to a healthy system of administrative law. **Attorney general. V. Independent Broadcasting Authority (1973) 1 All. E.R. 689.** Consequentially in such circumstances the strict rule of standing has been liberalised in the united states, in England and in India.

7.5.7 Protecting Rule of law

In every society there is conflict between power and justice. In a rule of law society like India public interest litigation has been resorted to protect the rule of law.

In Bimal Prasad Das.V. Bijayanand Patnaik

PIL was brought before the Orissa High court against the chief ministers call for beating up corrupt officials. Such a call, according to the petitioners, involved

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injury to public interest and rule of law. The H.C agreed that a grave threat to the rule of law and the impairment of right to life guaranteed by Art.21 was involved in the call of the chief minister who had transgressed his limits in giving a call to beat the corrupt officials..

The principle laid down in this case that in a PIL, petitioner need not himself be an 'aggrieved person' Any member of the public can bring an action for the maintenance of rule of law and basic structure of the constitution. It is therefore also known a public interest lawyering. .

In Kumar Padma Prasad.V. Union of India (AIR 1992 SC 1220)

A person was appointed as a judge of a High court but be never held judicial office. In this way he did not fulfil the qualification essential for appointment of a judge of a High court. His appointment was challenged by a PIL petition. It was held by the Supreme court that appointment was challenged by a PIL petition. It was held by the Supreme court that appointment was liable to be quashed.

7.5.8 Social Dimensions

Judges decide PIL cases according to the social picture consequently the social dimensions of PIL have been expanding. PIL has covered a large number of areas in socio-economic sphere. Accordingly large number of cases have been decided by the courts is response to socio-economic challenges. Such cases are sought to be classified and discussed under the following sub-heads.

1. Policing criminal justice.
2. Labour welfare and liberation of Bonded labour.
3. Protecting of women fro exploitation
4. Alleviation of poverty and ameliorating measures.
5. Protecting public health
6. Prevention of corruption in public Administration.
7. Streaming judicial system.
8. Prevention of Environmental pollution and Ecological imbalance.

7.6 SUMMARY

Administrative law provides for control over the administration by an outside agency strong enough to prevent injustice to the individual while leaving the administration adequate freedom to enable it to carry on effective Government. Due to increase in governmental functions, administrative authorities exercise vast powers

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is almost all fields. But as has been rightly observed by Lord Denning. "properly exercised the new powers of the executive lead to welfare state, but abused they lead to the Totalitarian state". Without proper and effective control an individual would be without remedy, even though injustice is done to him. This would be contrary to the fundamental concept in English and Indian legal system in which the maxim.

'Ubi jus ibi remedium'(wherever there is a right there is a remedy) has been adopted since long. In fact, right and remedy are two sides of the same coin and they cannot be dissociated from each other. The remedies available to an individual aggrieved by any action of an administrative authority may be,

i) Prerogative remedies

ii) Constitutional law remedies.

While remedies are provided for violation of fundamental rights under the constitution, another concept of remedy is public interest litigation which is also protecting social, collective 'diffused rights' and interests or vindicating public interest.

7.7 KEY WORDS

Aggrieved	-	A person who was suffered aggrievance or wrong
Litigation	-	Judicial contest; Law suit
PIL	-	Public interest Litigation
Locus Standi	-	It signifies a right to be heard
Habeas Corpus	-	Produce the body before the court
In fragments	-	Breach of a law (or) violation of a right

7.8 ANSWERS FOR CHECK YOUR PROGRESS QUESTIONS

For	Question No.1	...	Refer Section No. **7.2.5**
	Question No.2	...	Refer Section No. **7.2.5 & 7.2.4**
	Question No.3	...	Refer Section No. **7.1**
	Question No.4	...	Refer Section No. **7.2.2**
	Question No.5	...	Refer Section No. **7.5.2**

7.9 MODEL QUESTIONS

A. Short answer Questions

1. Writ of Habeas corpus write short notes.

2. What are the conditions under which a writ of mandamus is issued?

3. Special leave to Appeal by the Supreme court –write short notes.

(Space for Hints)

B. Long answer questions

1. Examine the scope of the writ jurisdiction of the High courts.
2. Examine the ground's for the issue of writ of mandamus. Can this writ be issued to enforce a civil liability arising out of a contract?
3. Explain : (a) Alternative remedy rule
   (b) Resjudicata in writ proceedings
   (c) Laches.

UNIT – 8

PRIVATE LAW REVIEW – EQUITABLE REMEDIES

(Space for Hints)

INTRODUCTION

Besides the constitutional remedies some other ordinary civil law remedies are also available to an aggrieved person against the government. These remedies include, suit for injunction, declaration and action for damages which are called suitable remedies. They are known as equitable remedies because these remedies are granted by the courts on equitable grounds. During the earlier days in England if any person suffered from abuse of power by an administrative officer, he could seek redress in the equity courts through an injunction or declaration. The word 'equitable' signifies that the remedies of injunction, declaration and action for damages are broadly based on principles of good conscience, justice and reason. In fact, the equitable remedies are forceful source to check the abuse of power. They played very significant role in checking the misuse of administrative discretion.

In an old case namely *Damodar V. Municipal Committee, Delhi* the exercise of the discretionary powers by the authority has been regulated by the issue of injunction. Because of their simple procedure and effective role in restraining an administrative officer from doing unlawful acts and for the declaration of lawful title of the persons, the equitable remedies are highly useful.

In addition to constitutional remedies under Arts 32,136,226 and 227, the ordinary courts are empowered to exercise the power in accordance with the ordinary law of the land, to control administrative action. Private law review is exercised through in junction, declaratory action and suit for damages. Equitable remedies are also broad based when compared with writs, in so far as they allow production of evidence and examination of witnesses as a fundamental requirement for decision.

The main difficulty is, sec. 80 of the Civil Procedure Code which requires two months notice to the government before filing the suit. However by the 1976 amendment of the code of civil procedure the court was empowered to waive the requirement of two months notice in suitable cases.

OBJECTIVES

- ❖ To understand the meaning of Private Law Remedies.
- ❖ To know about the meaning equitable Remedies.
- ❖ To study the meaning and types of injunction.
- ❖ To understand the meaning and scope of Declarations action.

(Space for Hints)

- ❖ To Analayse the term of statutony exclusion of judiual Remedies.
- ❖ To Discuss, How the courts construe Quster clause.

UNIT STRUCTURE

8.1 Definition for Injunction

8.2 Kinds of Injunction

8.2.1. Temporary Injunction

8.2.2. Perpetual Injunction

8.2.3. Mandatory Injunction

8.2.4. Principles

8.3 Declaratory Action

8.3.1. Historical Growth

8.3.2. Definition

8.3.3. Conditions for the Grant of Declaratory Relief

8.3.4. Scope of Declaratory Action

8.3.5. Consequential Relief

8.3.6. When Declaration is Refused

8.3.7. Suit for damages

8.4 Meaning of Statutory Exclusion of Judicial Remedies

8.4.1. Decision Affecting the Rights of a Tenant

8.4.2. Decision Affecting the Rights of a worker

8.4.3. Decision Requiring Expertise

8.4.4. Revenue Matters

8.4.5. Decision of Autonomous Bodies

8.4.6. Laws dealing with extra – ordinary situations.

8.5 How the courts construe ouster clause

8.5.1. Constitutional Remedies

8.5.2. Jurisdictional Error

8.5.3. Violation of the Principles of Natural Justice

8.5.4. Violation of fundamental Rights

8.5.5. Unconstitutionality of the Statue

8.5.6. Position in England

8.5.7. Conclusion

8.6. Summary

8.7. Keywords

8.8. Answers to Check your progress

8.9. Model Questions

(Space for Hints)

8.1 DEFINITION FOR INJUNCTION

Lord Halsbury has defined it as a "judicial process whereby a party is ordered to restrain from doing or to do a particular Act or thing". It is a preventive remedy which may be issued when a person's right, legal or equitable, is invaded or is threatend to invade. It may be issued to restrain from continuing or commencing such wrongful act. It is discretionary remedy granted on equitable grounds. The discretion must be exercised judicially. The plaintiff in an injunctions suit must prove a superior equity in his favour entitling him to the grant of injunctions. Law regarding injunction is laid down in the specific Relief Act 1963. The Act deals with three kind.

8.2. KIND OF INJUNCTION

8.2.1. Temporary Injunction

S.37 (i) of the specific Relief Act, 1963 deals with the temporary injunction. Temporary injunction will continue only for a specified period or until further order of the court. It may be granted at any stage of a suit. It is also called as interlocutory injunction.

The basic principles for granting injunctions are,

1. The court should be satified that the plaintiff has prima facie case.
2. The court's interference is necessary to protect him.
3. That the balance of convenience is in favour of the applicant and that there is no sufficient remedy open to him to protect himself.

Although the temporary injunctions are granted at the discretion of the court, the discretion is not arbitrary but guided by judicial principles.

8.2.2. Perpetual injunction :

S.37(2) of the specific Relief Act 1963 deals with the perpetual injunction. It can only be granted by the decree made at the hearing and upon the merits of the suit by perpetual injunction the defendant will be perpetually (Permanently) restrained from the assertion of a right, or from the commission of an act, which would be contrary to the right of the plaintiff.

Check Your Progress Questions

3 Explain temporary Injunction?

(Space for Hints)

8.2.3. Mandatory Injunction

S. 39 of the Specific Relief Act, 1963 deals with Mandatory injunction. It is an order of a court *requiring the defendant to do some positive* act for the purpose of putting an end to a wrongful state of things created by him. It is, therefore, in its nature both prohibitory and resitutory.

Mandatory injunction can be claimed to restrain the breach of any obligation arising out of a contract or tort. The main object of Mandatory injunction is to compel the defendant to restore things to their former condition. Generally the court exercises this function with great caution. It will be resorted only in the cases where the other remedies are inadequate and the restoration of the things to their original condition is the only remedy to meet the requirement of justice. It is generally refused, if compensation is found to be an adequate remedy or *there is undue delay in filing the case.*

By issuing an injunction a public authority may be restrained from doing something which is illegal, or the authority may be commanded to do a particular act which it is bound to perform. *Injunction may be issued against judicial quasi – judicial and administrative authorities.* There are innumerable number of cases where injunction was granted the government and other public authorities.

8.2.4. Principles

Generally, *injunction is a negative remedy* and in administrative law, it is granted when an administrative authority does or purports to do anything ultra vires. But in some cases the remedy may be positive and Mandatory in nature and an administrative authority may be ordered to do a *particular act which* it is bound to do. But mandatory injunctions are rate and in public law because there is a special procedure for enforcing the performance of a public duty in the prerogative remedy of Madamus.

In the leading case of **Metropotitan Asylum District-V. Hill** (1881) 6 A C 193; 50 L J QB 353)

The relevant Act empowered the authority to build a hospital for children for *treatment of small-pox. A prohibitory injunction* was obtained by the neighbouring inhabitants on the ground of nuisance. Smiliarly. in **Harington V. Sendall :-**

The Plaintiff was not present at a general meeting of the club. A majority of the members, in breach of the rule of the club (which made unanimous concurrence *a prerequiste) increased the annual subscription for existing members.* As the plaintiff did not pay the increased subscription. He was expelled. An injunction was granted

Check Your Progress Questions

1 What is meant by ouster of jurisdiction?

to prevent such expulsion. Likewise, in **Administration of the city of Lahore.V. Abdul Majid :**

(Space for Hints)

The plaintiff submitted a building plan to the Municipal authorities for necessary permission. The permission was initially granted but thereafter revoked even though such permission was granted in respect of other buildings. The order of Mandatory injunction was issued against the Municipal authorities.

An injunction is a discretionary remedy, but the discretion must be exercised judicially. The plaintiff must be "an aggrieved person". Since this is an equitable relief it may not be granted if the conduct of the plaintiff disentitles him from the assistance of the court or if some alternative remedy is available to him. But if there is violation of any provision of law, the courts will not hesitate to take the 'drastic' step of issuing an order of injunction, and they will not be deterred by the fact that it will bring the machinery of the Government to a standstill.

In Bradbury V. London Borough Council (1967) 3 All ER 434

A local authority's scheme for setting up comprehensive schools was held to be illegal since no public notice had been given to object as required by the relevant statute. It was contended by the authorities that if the injunction would be granted, there would be administrative chaos. Lord Denning, M.R. stated :

"I must say this : If a local authority does not fulfil them. It will not listen readily to suggestions of 'chaos'. The department of education and the council are subject to the rule of law and must comply with it, just like everyone else. Even is chaos should result, still law must be obeyed.

The above principle laid down in Bradbury has been followed by the Supreme Court also. In the well – known case of **Prabhakar Rao V. State of A.P.,** The age of superannuation of government servants was reduced from 58 to 55 years. After sometime, however, the Government again restored the age of superannuation to 58 years. But during the interregnum period, certain employees who reached the age of 55 years, retired. They, thus, could not get the benefit of enhanced age of retirement. The question before the court was whether they were entitled to reinstatement and back wages. A contention was raised on behalf of the state Government that 'there would be considerable chaos in the administration if those who have already retired are now directed to be reinducted into service'. The said contention was negatived by the court on the principle that "those that have stirred up a hornet's nest cannot complain of being stung".

In India, the law relating to perpetual injunction is discussed in sections 36, 37 and 38 of the specific Relief Act, 1963 and Mandatory injunction in section 39 of the said Act, while the law relating to temporary injunction is laid down in order XXXIX of the code of civil procedure 1908.

Check Your Progress Questions
2 Declaratory action - write short notes

(Space for Hints)

8.3. DECLARATORY ACTION

8.3.1. Historical Growth :

In India, provision for declaratory relief was first introduced by S.15 of the Civil procedure code of 1859. It was repealed by the Civil procedure of 1877, but it reappeared in S.42 of the specific Relief Act, 1873. And now provision for declaratory action is provided by S.34 of the specific Relief Act, 1963 which repealed the earlier Act of 1873.

8.3.2. Definition

Declaration is a judicial order issued by the court simply declaring the rights of the parties without giving any further relief. By declaring the rights it not only removes the existing doubts regarding the rights but also it secures the enjoyment of the property. It does not prescribe any sanction against the defendant. It is an equitable remedy. Declaration may be issued in different forms like affirmative and negative. For example a declaration.

(i) that the plaintiff has the right, power, privilege or immunity that he claims.

(ii) that the defendant is under the duty or liability as asserted by the plaintiff.

(iii) that the defendant has no right, power, privilege or immunity that he claims.

(iv) that the plaintiff is not under the duty or liability to which the defendant claims.

8.3.3. Conditions for the Grant of Declaratory Relief :

(i) The plaintiff must be entitled to some legal right.

(ii) There must be some danger or to such right or interest.

(iii) The defendant should be a person denying or interested to deny the plaintiff's title to such legal right.

(iv) If the plaintiff is entitled to any further relief than a mere declaration, he must seek such further relief also.

Since it is a discretionary remedy, even if all conditions are satisfied the court may refuse to grant declaration in appropriate cases. Because the declaratory relief may some times by abused by the parties with a view to avoid court fees. Declaration when sought against the government must satisfy S.80 C.P.C. notice.

(Space for Hints)

8.3.4. Scope of Declaratory Action :

S.34 which deals with the scope of declaration reads as follows "any person entitled to any legal character or to any rights as or any property, may institute a suit against any person denying, or interested to deny his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled" . . . . .

The section does not include every kind of declaration. It refers to a declaration that the plaintiff is entitled to a specific legal character or to any right as to property.

In public law litigation, declaration can be used as the most appropriate remedy when the citizen needs only a mere judicial order regarding the validity of an administrative action or a decision of a quasi – judicial body, or a delegated legislation. In England declaration is commonly sued as an alternative to the writ of ceriorari.

By granting declaratory relief the court declares a particular Act as unconstitutional.

In Narayanaprasad V. Indian Iron and Steel co. (AIR 1953 cal. 695)

The Iron and steel companies Amalgamation Act, 1952 was declared as ultra vires and void. Where administrative discretion is abused or is illegally exercised a declaration can be issued directing the authority to exercise the discretion lawfully. In cases where the order of an authority is void for violation of the principles of natural justice declaration can be issued declaring the order as void. Even if an authority's decision is given finality by law the court can check such decisions through a declaration if such decision is without jurisdiction or in excess of jurisdiction. A declaratory order binds the parties to the suit and also those parties who claim through them.

8.3.5. Consequential Relief :

S. 34 provides that if a person is entitled to claim further relief ie. a relief consequential to the declaration, he must claim the further relief also. This provision is intended to prevent multiplicity of litigation. (Eg.) In the matter of wrongful dismissal from service, the aggrieved can claim not only a declaration that the dismissed is wrong but also reinstatement, arrears of salary and damages etc. as a consequently relief. If the consequential reliefs which the plaintiff is entitled to are not claimed the court may refuse to grant declaration. The further relief contemplated here is only against the defendant and not against the third party.

8.3.6. When Declaration is Refused :

In the following circumstances the court may refuse to grant declaration :

(Space for Hints)

(i) Where the plaintiff has no legal interest to sustain the aciton.

(ii) Where the claim is pre mature.

(iii) Where the issue is not real but fictitious.

(iv) Where the situation on which the petition (plaint) was based no longer exists.

(v) When there is no substantial injury to the plaintiff.

(vi) Where the defendant has not denied the plaintiff's claim.

(vii) When declaration may not given any benefit to the party obtaining it.

(viii) Where there is inordinate delay.

(ix) Where the declaration is infructuous.

(x) Where there is an adequate alternative remedy available to the petitioner.

8.3.7. Suit for damages :

Whenever any person has been wronged by the action of an administrative authority, he can file a suit for damages against such authority. Negligence or nuisance caused by the failure to perform a statutory duty was held to render an authority liable in damages.

Damages are a monetary compensation allowed to the injured party for the lessor injury suffered by him. It is not by way of punishment for a wrong inflicted. It is not punitive in nature but only compensatory. The foundation of modern law of damages, both in India and England is based on *Hadley V. Baxandale* (1854) 9 Ex. 341.

The rule laid down in *Hadley V. Baxandale* is incorporated in Sec. 73 of the Contract Act, which deals with compensation for loss or damage caused by breach of contract. The damages may be classified as follows :

1. General damages 2. Special damages 3. Nominal damages 4. Exemplary damages 5. Contemptuous damages 6. Liquidated damages.

8.4. STATUTORY EXCLUSION OF JUDICIAL REMEDIES

Statutory exclusion of judicial remedies means excluding the jurisdiction of the courts from reviewing an administrative action and thereby giving finality to the administrative decisions. It is generally done through individual statutes. The particular section of the Act which excludes the jurisdiction of the court is known as ouster clause, exclusion clause, or, in finality clause.

Check Your Progress Questions

4. When Declaratory Relief is denied?

The main reason for giving finality to an administrative decision and excluding the judicial review seems to be that the advantages of administrative decision making will be nullified if the decision is again reviewed by the slow and dilatory process of ordinary courts. S. 9 of the C.P.C. which confers a general jurisdiction to civil courts to entertain suits also recognized this concept and it reads that the court has jurisdiction to try all cases of civil nature except where in its jurisdiction is expressly or impliedly excluded. The tendency of excluding the jurisdiction of the courts are very strong, particularly, in the following areas.

8.4.1. Decision Affecting the Rights of a Tenant : Majority of the laws which were passed to give protection to the weaker sections of the society like tenants, contain a clause excluding the jurisdiction of the courts and giving finality to the decisions of the authorities. Eg. (i) S. 85 of the Bombay Tenency and Agricultural Lands Act, 1948. (ii) S. 125 of Kerala Land Reforms Act. 1963.

8.4.2. Decision Affecting the Rights of a Worker : Certain statute which have been passed with the object of protecting the interest of workers excludes judicial review. The main consideration for exclusion of judicial review is to safeguard the rights and interest of the workers from unnecessary harassment in ordinary courts. Eg. (i) S. 24 of the Minimum Wages Act, 1948, (ii) S. 106 of the Factories Act, 1948.

8.4.3. Decision Requiring Expertise : Fixation of railway rates, electricity rates etc., require considerable expertise in the field to workout the rates in relation to the cost. The tendency of law in such cases are to give finality to the decisions of the authorities concerned and exclude the jurisdiction of the courts to review it again. Eg. (i) Ss. 46,81 (ii) of the Indian Railways Act, 1890, (ii) S. 57 (a) of the Electricity Supply Act, 1948.

8.4.4. Revenue Matters : Most of the taxing statutes confer exclusive decision making power to the concerned authorities and the courts are barred from entertaining suits against their decisions. If prolonged litigation is allowed against the decisions of the taxing authorities in the ordinary courts it will adversely affect the country's revenue. Eg. S.293 of the Income Tax Act. 1961.

8.4.5. Decision of Autonomous Bodies : Most of the decisions of the autonomous bodies are excluded from the ordinary judicial review. This is done so in order to preserve its autonomous character. Eg. S. 51 of the Madras Co-operative Societies Act, 1932.

8.4.6. Laws dealing with Extra-ordinary situations : Most of the laws which are enacted to meet emergency or extraordinary situations contain provision excluding the jurisdiction of the court. Eg. S. 61 of M.I.S.A., 1971 (now repealed).

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Check Your Progress Questions

5. What meaning of statutory exclusion of judicial remedies?

(Space for Hints)

8.5. HOW THE COURTS CONSTRUE OUSTER CLAUSE?

There is difference of opinion among different High courts and even in the Supreme Court (in different decisions) on the effect of statutory exclusion of judicial review. The extent of actual exclusion depends more on judicial attitudes than on the type of statutory formula used. How so ever strongly worded it maybe, has never succeeded in totally excluding the jurisdiction of the courts. The courts have held that in the following cases judicial review is possible even if the relevant statute contains provisions regarding exclusion of judicial review.

8.5.1. Constitutional Remedies : The judicial review of the administrative actions under Art. 32, 126 and 227 cannot be restricted or excluded by using exclusion clause in a statute, because all statutes are subject to the provisions of the Constitution and a statute cannot override the provisions of the Constitution. There is one case where the Constitution (Art, 223-A) itself empowers the government to make law even to oust the jurisdiction of the High hurts and the Supreme Court under Art. 226 and 32 with regard to the decisions of the Administrative Tribunals, when the Administrative Tribunals are constituted. Parliament passed the administrative Tribunals Act in 1985 constituting Administrative Tribunal.

An ouster clause at the most can exclude or control the statutory remedies such as injunction and declaration. The judiciary has never taken the ouster clause at its face value, or in its literal sense, but has always sought to restrict the scope of such clauses. The judicial view is that whatever be the phraseology of an ouster clause there is till, always, Some residue of jurisdiction left to the courts to review administrative actions, because Art. 32, 136, and Art. 226, 227 confer extraordinary jurisdiction on the Supreme Court and High Courts respectively.

These constitutional remedies may, of course, be excluded in specific matters by other constitutional provisions. For example, Art. 217 (3) declares 'final' the decision of the President on the question of the age of a High Court Judge. Nevertheless, the Supreme Court held in ***Union of India V.J.P. Mitter*** (AIR 1971 SC 1903) that "notwithstanding the declared finality of the order of the President the court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on collateral considerations, or the rules of natural justice were not observed, or that the President's judgement was coloured by the advice or representation made by the executive, or it was founded on no evidence."

8.5.2. Jurisdictional Error : The Indian courts have generally accepted the proposition that no ouster clause can bar the judicial review of administrative action if it is challenged on the ground of jurisdictional error. In such cases not only writs and other constitutional remedies but also statutory remedies like injunction and

declaration can also be possible, because the ouster clause did not protect actions which were ultra vires and bad in the eye of law. Jurisdictional error or lack of jurisdiction may arise in any one of the following ways. (i) if the authority is improperly constituted. (ii) if the authority is incompetent to take actions in respect of territory person, or subject matter. (iii) If the authority commits an error in jurisdictional facts and there by assumes jurisdiction which never belongs to it. (iv) The law which gives jurisdiction itself is unconstitutional. (v) If the authority has exceeded its jurisdiction in deciding the matter. (vi) If the authority has misused or abused its jurisdiction.

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8.5.3. Violation of the Principles of Natural Justice : An ouster clause in the statute cannot prevent the courts from reviewing an order passed there under, if it is challenged on the ground of violation of the principles of natural justice. In *Secretary of State V. Mask and company* (AIR 1940 PC 105) the Privy Council laid down a general proposition that the jurisdiction of the court would not be excluded when the tribunal or the administrative authority had not acted in conformity with the fundamental principles of judicial proceedings i.e., if it has violated the principles of natural justice. This rule has been followed in a number of later case.

8.5.4. Violation of Fundamental Rights : The judicial opinion is unanimous that an administrative action can be challenged as violative of fundamental rights, even if the relevant statute under which the impunged order was taken contains an ouster clause. Administrative authorities cannot interfere with the fundamental rights under the cover of ouster clause.

8.5.5. Unconstitutionality of the Statute : It is now well settled that an ouster clause cannot bar the jurisdiction of the courts to entertain judicial review questioning the constitutionality of a statute even if the relevant statute contains an ouster clause similarly an administrative action can be challenged as Unconstitutional even if the relevant statute under which such decision was taken contains an ouster clause.

8.5.6. Position in England : In England the Committee on Minister's powers in 1932 and the Franks committee in 1957, have taken strong exceptions to the abundant use of the ouster clauses. The judicial attitude has always been to give a restrictive and narrowest possible meaning to such clauses. *Anisminic V. Foreign Compensation Commission* (1962, 2 AC 147) is a leading case on the scope of the ouster clause. In that case an ouster clause in the Foreign Compensation Act, 1950 was in question. According to the relevant clause the decision of the Commission on a application under the Act shall not be questioned in any court of law. The court held that this provision did not protect actions which were ultra vires the powers of the Commission.

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8.5.7. Conclusion : Inspite of various decisions on the effect of the ouster clause, still lot of confusion exists on the question of the scope of ouster clause. The courts exercise a good deal of discretion in this area.

The decision in *Poona Municipality V. Dattatraya* (AIR 1965 SC 555) was a classic example of the conflict of views regarding the scope of the ouster clause within the hierarchy of courts. In that case while refunding the illegally collected Octori duty, the Municipality deducted 10% of the amount. The respondent filed a suit for the refund of the amount so deducted. S. 487 of the Bombay Provincial Municipal Corporation Act, 1949 prescribed a time limit of six months for instituting suits against the Municipality in respect of any act done under the Act. Here the suit was filed after the expiry of the six months time limit mentioned in the Act. The main question before the court was whether the suit was barred by the ouster clause.

The Trial Court held that the suit was not barred but did not grant any relief holding that the deduction was valid.

On appeal the District Court held that the deduction was not valid, but suit was barred by the ouster clause, because the suit was filed after six months time prescribed under the Act.

On appeal the High Court held that the deduction was invalid, and the suit was not barred by the ouster clause. On further appeal the Supreme Court confirmed the view of the High Court.

It may be submitted that an ouster clause supplemented with an adequate alternative remedy to redress the grievances may be given full effect to and a simple ouster clause not backed by any adequate alternative remedy may be interpreted very restrictively.

8.6. SUMMARY

Apart form the (constitutional remedies) public law Review there are certain ordinary (civil law remedies) private law Review also available to an aggrieved citizen against an unlawful administrative action. They are

(i) injunction

(ii) declaration and

(iii) damages

These remedies are known as equitable remedies because these remedies are granted by the courts on equitable grounds. These remedies are of great value because it provides simple and cheaper mechanism for getting a relief. But the only hardship is the requirement of S. 80 C.P.C. notice (two months notice before filing a case). If

S.80 C.P.C. is abolished then these remedies will become more purposeful and effective.

(Space for Hints)

Another remedy is statutory exclusion of judicial remedies which means excluding the jurisdiction of the courts from reviewing an administrative action and thereby giving finality to the administrative decisions.

8.7 KEY WORDS

Injunction	-	An order or judgement by which a party to an action is required to do or retrain from doing a particular thing.
Jurisdiction	-	Extent of Power.
Perpetual	-	Order and is not restricted as to time.
Adequate	-	Sufficient
Declaration	-	The act of declaring something which is declared
Testimony	-	The evidence of a witness given viva voce in a court of justice.
Exclusion	-	Act of rejecting
Ouster	-	Dispossession

8.8 ANSWERS FOR CHECK YOUR PROGRESS QUESTIONS

For	Question No.1	...	Refer Section No. **8.5**
	Question No.2	...	Refer Section No. **8.3.2**
	Question No.3	...	Refer Section No. **8.2.1**
	Question No.4	...	Refer Section No. **8.3.6**
	Question No.5	...	Refer Section No. **8.4**

8.9 MODEL QUESTIONS

A. Short answer questions

1. Constitutional Remedies – write short Notes.
2. Perpetual Injunction – write a note.
3. Suit for damages – Give short Answer.

B. Long answer questions

1. Explain the types of Injunction?
2. Define Declaration? And what are the essential conditions for seeking Declaratory Relief?
3. Explain the statutory exclusion of Judicial remedies?

(Space for Hints)

UNIT – 9
LIABILITY OF STATE

INTRODUCTION

In any democratic society where government assumes the role of a 'social service state' in the interest of general welfare, the question of government liability evokes a serious response. At one end the concept of intensive form of government requires active participation of state in welfare and service activities where as at the other end, the concept of government liability may have dampening effect on such participation. In such a context, a very delicate balance has to be drawn.

There may be two courses open to a person who has been wronged or made to suffer a loss. Thus, the aggrieved person may either sue the officer concerned or proceed against the government on whose behalf he was acting. Early rule of law recognised the principle of liability of the officer concerned treating him nothing more than an ordinary citizen. However, with the increase of governmental functions, there has been a shift from the "officer's Liability" to "State liability", on whose behalf the he discharges the functions. The factor responsible for such shift seems to be the apprehension that the concept of 'officer's liability may have chilling effect on the independence and initiative of the officers acting on behalf of government charged with social obigation for promoting social welfare.

OBJECTIVES

- ❖ To know about the liability of state
- ❖ To study about the contractual and Tortious Liability.
- ❖ To Discuss the vicarious liability in English Law and Indian Law.
- ❖ To understand the soverign and non sovereign function of Before commencement of constitution and after commencement of constitution.
- ❖ To know about the privilege and immunities of state.

UNIT STRUCTURE

9.1 Contractual Liability of State

a. Prior to commencement of constitution

b. Constitution Provisions for Government contracts

c. Requirements for formation of contracts

9.2 Tortious Liability

9.2.1. Doctrine of vicarious liability

9.2.2. English Law

9.2.3. Indian Law

9.2.4. Constitutional Provisions

9.2.5. Sovereign and Non-sovereign functions

A. Before commencement of consfitution

B. After commencement of constitution

9.3 Privilege and immunities of State

9.4 Whether state is bound by statute

9.5 Privilege to with hotel documents

9.6 Immunity from Estoppel

9.7 S. 80 Notice under Civil Procedure code.

9.8 Summary

9.9 Keywords

9.10 Answers to check your progress

9.11 Model Questions

(Space for Hints)

9.1.a. Prior to Commencement of Constitution :

Ever prior to the commencement of the constitution of India, the liability of the government for breach of contract was recognised. It was essentially for commercial activities that the East India company was established in India. The factor that East India company also exercised sovereign functions "did not constitute them sovereigns" and did not extend the doctrine of sovereign immunity from being sued in its own courts to the company. This point was made clear as early as 1785 when the court held in **Moodalay V. Mortan**.

The East India Company was subject to the jurisdiction of the Municipal courts in all matters and proceedings undertaken by them as a private trading company. Expounding the doctrine of liability of East India company in contract, the court observed.

"It has been said that East India company have a sovereign power, be it so; but they may contract in a civil capacity; it cannot be denied that in a civil capacity they may be sued; in a case now before the court, they entered into a private contract; if they break their contract they are liable to answer for it.

Such liability of the government had been given statutory recognition as well. Thus provisions were made in the Government of India Acts of 1833, 1858, 1915 and 1935.

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9.1.b. Constitutions Provisions :

The distinctive features of the government contracts have been laid down in the constitution itself providing, for the contractual liability of the union of India and States. Article 298 expressly lays down that the executive power of the union and of each state shall extend to the carrying on of any trade or business and the acquisition, holding and disposal of property and the making of contracts for any purpose.

9.1.c. Requirements for formation of contracts :

1. The contract must be expressed to be made by the president or the Governor as the case may be

2. The contract must be executed an behalf of the president (or) the Governor as the case may be.

3. The contract must be executed by a person authorized by the president or the Governor as the case may be.

1. The contract must be expressed to be made by the president or the Governor as the case may be :

It is a mandatory condition which has to be complied with for making a contract valid. In *Karamshi v. State of Bombay* the appellant entered into a contract with the Minister of P.W.D for irrigation of his land. After some time the irrigation facilities were stopped. It amounted to breach of contract. In this case the Supreme Court held that there is no contract which can be enforced, because the requirement that the contract should be expressed to be made in the name of Governor has not been complied with. But in some cases the court relaxed the rigorous application of this rule. *Thus in* ***Davecos Garments Factory v. Rajasthan*** a contract was signed by the competent officer but was not signed in behalf of the Governor. But the Supreme Court held the contract to be valid as it was signed by authorized officer.

In Union of India V. Rallia Ram (AIR 1963 SC 1685)

Tenders were invited by the Chief Director of purchases, Government of India. R's tender was accepted. The letter of acceptance was signed by the Director. The question before the supreme court was whether the provisions of section 175(3) of the Government of India Act, 1935 (which were in pari Materia with Article 299(1) of the constitution of India) were complied with. The court held the Act did not expressly provide for execution of a formal contract. In absence of any specific direction by the Governor – General, prescribing the Manner or mode of entering into contracts, a valid contract may result from the correspondence between the parties. The same view was reiterated by the supreme court in **Union of Indian V. N.K (P) Ltd.** (1973) 3 SCC 388 (394).

Where in the court observed, "It is now settled by this court that though the words 'expressed' and 'executed' in Article 299(1) might suggest that it should be by a deed or by a formal written contract, a binding contract by tender and acceptance can also come into existence if the acceptance is by a person duly authorised on this behalf by the president of India.

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2. The contract must be executed an behalf of the president or the Governor as the case may be :

It is another requirement to be complied with as per Art 299. If such authority by, mistake or otherwise does not sign on behalf of the chief executive the contract shall become invalid, as it also belongs to the category of mandatory conditions. *Devecos Garments factory v. State of. Rajasthan*, illustrates the second point also.

In Bhikraj Jaipuria, the contracts entered into by the Divisional Superintendent were not expressed to be made on behalf of the Governor – General. Hence, the court held that they were not enforceable even though they were entered into by an authorised person.

In Karamshi Jethabhai V. State of Bombay : the plaintiff was in possession of a cane farm. An agreement was entered into between the plaintiff and the Government for supply of canal water to the land of the former. No formal contract was entered into in the name of the Governor but two letters were written by the superintending Engineer. The Supreme Court held that the agreement was not in accordance with the provisions of section 175 (3) of the Government of India Act, 1935 and, consequently, it was void.

Similarly in **D.G. Factory v. State of Rajasthan** A, contract was entered into by a contractor and the Government. The agreement was signed by the Inspector General of Police, in his official status without stating that the agreement was executed "on behalf of the Governor". In a suit for damages filed by the contractor for breach of contract, the supreme court held that the provisions of Article 299(1) were not complied with and the contract was not enforceable.

3. The contract must be executed by a person authorized by the President or the Governor as the case may be :

Art. 299 does not lay down any specific mode of authorisation therefore, the normal governmental procedure of notification in the official gazette may be considered as a proper notification. Lack of proper authority would render the contract in valid. Implied authorities must be considered as substantial compliance. In *Bhikraj Jaipuria v. Union of India*, foodgrains were supplied to the railways in pursuance of

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an order placed by the divisional superintendent. In fact, the divisional superintendent was not authorized to sign the contract. But since an officer of the Railway Board was authorized to take delivery, transport and distribute the food grains to Railway ration shops, *the court held that the divisional superintendent had the implied authority* to execute the contract.

The Supreme Court has laid down (*In Chatturbhuj V. Moreshwar* (1954), *State of U.P. V. Murari Lal*, 1971) that the above mentioned formalities are mandatory and failure to comply with the requirements would render the contract invalid In the latter case Supreme Court also held that a contract not in accordance with Art. 299 cannot be ratified. There fore, it is clear that a contract not complying with the formalities will not be binding on the state. It is absolutely void and inoperative.

Generally the courts in India have been inclined to consider the conditions enumerated in Art. 299 as mandatory. But when such an approach results in financial loss to the government, it may be varied to suit the situation.

So also in order to protect innocent persons the courts have held that if the government has derived any benefit under an unenforceable agreement, the government may be held liable to compensate the other contracting party under S.70 of the Indian Contract Act, on the basis of the quasi contractual liability, to the extent of the benefit received.

In State of U.P.V. Murarilal, an officer in the Department of Agriculture contracted for reservation of space in a cold storage for potatoes from Agriculture Department. Space was reserved by the proprietors of the cold storage. But potatoes were never sent from the Agriculture Department. When the proprietors sued for damages, the supreme court held that the requirements of Art. 299 were not complied with. The contract was void and not capable of satisfaction. It was also held that S.70 of the Contract Act was not applicable because the government had not derived any benefit under the contract. In such situations an individual is left without any remedy.

In **State of Bihar** v. **Karam Chand Thapar.** (AIR 1962 SC 110), the plaintiff entered into a contract with the Government of Bihar for construction of an aerodrome and other works. After some work, a dispute arose with regard to payment of certain bills. It was ultimately agreed to refer the matter for arbitration. The said agreement was expressed to have been made in the name of the Governor and was signed by the Executive Engineer. After the award was made. The Government contended in civil court that the Executive Engineer was not a person authorised to enter into contract under the notification issued by the Government and therefore, the agreement was void. On a consideration of the correspondences produced in the

case, the supreme court held that the Executive Engineer had been "Specially authorised" by the Governor to execute the agreement for reference to arbitration.

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9.2. TORTIOUS LIABILITY

9.2.1. Doctrine of Vicarious Liability :

Since the State is a legal entity and not a living entity. It has to act through human agency. i.e. through its servants. When we discuss the tortious liability of the State, it is really the liability of the state for the tortious acts of its servants that has to be considered. In other words, it refers to when the state can be held vicariously liable for the wrongs committed by its servants.

Vicarcious liability refers to a situation where one person is held liable for act or omission of other person. Winfield explains the doctrine of Vicarious liability thus : "the expression" Vicarious liability' signifies the liability which A may incur to C for damage caused to C by the negligence or other tort of B. It is not necessary that A shall have participated in any way in the commission of the tort nor that a duty owed in law by A to C shall have been broken. What is required is tat A should stand in a particular relationship to B and that B's tort should be referable in a certain manner to that relationship". Thus, the Master may be held liable for the tors committed by his servant in the course of employment.

The doctrine of Vicarious Liability is based on two maxims :

(i) Respondect superior (Let the Principal be liable); and

(ii) Quit facit per aluim facit per se (he who does an act through another does it himself).

The doctrine of vicarious liability is based on 'Social convenience and rough justice.

There is no reason why this doctrine should not be applied to the crown in respect of torts committed by its servants. In fact, if the crown is not held vicariously liable for such torts, the aggrieved party, even though it had sustained a legal injury, would be without any effective remedy, in as much as the government servant may not have sufficient means to satisfy the judgement and decree passed against him.

9.2.2. English Law

The feudal concept "King can do no wrong" ruled the law of tortious liability of state in England. Absolute immunity of the crown was accepted and the crown could not be sued in tort for wrongs committed by its servants in course of their employment. However, with the growth of governmental functions the general immunity afforded to the crown in tortious liability proved to be incompatible with

Check Your Progress Questions

6 What is meant is preventive relief?

(Space for Hints)

the demands justice. Thus, in course of time it came to be realised that the doctrine of sovereign immunity had become outmoded in the context of modern developments. Accordingly, the general immunity of the crown was abolished by the parliament enacting the crown proceedings Act 1947. This Act placed the Government in the same position as a private person, Now the position is that the Government can sue and be sued.

9.2.3. India Law :

As regards sovereign immunity in India, the maxim. "The king can do no wrong" has never been accepted. Absolute immunity of the Government was not recognised in Indian Legal system even prior to the commencement of the constitution. In a number of cases, the Government was sued and held liable for tortious acts of its servants.

9.2.4. Constitutional Provisions :

Under Article 294 (b) of the constitution, the liability of the Union Government or a state Government may arise 'out of any contract' or 'otherwise' the word 'otherwise' suggests that the said liability may arise in respect of tortious acts also. Under Article 300(1), the extent of such liability is fixed. It provides that the liability of the union of India or a state Government will be the same as that of the Domion of India and the provinces before the commencement of the constitution. It is, therefore necessary to discuss the liability of the Domion and the provinces before the commencement of the constitution of India.

9.2.5. Sovereign and Non-Sovereign functions :

A. Before commencement of Constitution :

The English Law with regard to immunity of the Government for tortious acts of its servants is partly accepted in India also. As observed by the High court of Calcutta.

In steam Navigation co., as a general rule this is true, for it is an attribute of sovereignty, and a universal law that a state cannot be sued in its own courts without its consent'. Thus, a distinction is sought to be made between 'sovereign functions' and 'non-sovereign functions' of the state. In respect of the former, the state is not liable in tort, while in respect of the latter, it is. Let us try to understand the distinction between sovereign and non – sovereign functions with reference to some concrete cases on the point.

Check Your Progress Questions

1 Sovereign functions - write short notes.

Peninsular and oriental steam Navigation V. Secretary of State (1861) 5 Bom HCR App 1.

It is considered to be the first leading case on the point. In this case, a servant of the plaintiff – company was taking a horse – driven carriage belonging to the company. While the carriage was passing near the government dockyard, certain workmen employed by the Government, negligently dropped an iron piece on the road. The horses were started and one of them was injured. The plaintiff – company filed a suit against the defendant and claimed Rs. 350 as damages. The defendant claimed immunity of the crown and contended that the action was not maintainable. The High court of calcutta held that the action against the defendant was Maintainable and awarded the damages the court pronounced.

"There is a great and clear distinction between acts done in the exercise of what are usually termed a sovereign powers, and acts done in the conduct of undertakings which might be carried on by private individuals without having such powers delegated to them."

Holding the Government liable, the court further observed; "The secretary of state is liable for damages occasioned by the negligence of servants in the service of Government. If the negligence is such as would render an ordinary employer laible.

From the aforesaid observations of the court, it is clear that the court classified the acts of the secretary of the state into two categories –

(i) sovereign acts and

(ii) non-sovereign acts.

In respect of the former category of acts, the secretary of state was not liable, but in respect of the latter category of acts he was as the impugned act fell within the second category. The action was maintainable.

B. After commencement of constitution

In State of Rajasthan V. Vidhyawati AIR 1962 SC 933 (940) :

A jeep was owned and maintained by the state of Rajasthan for the official use of the collector of a district. Once the driver of the jeep was bringing it back from the workshop after repairs. By his rash and negligent driving of the jeep a prdestrian was knocked down. He died and his widow sued the driver and the state for damages. A constitution Bench of the Supreme court held the state vicariously liable for the rash and negligent act of the driver.

The court after referring to the steam Navigation co. did not go into the wider question as to whether the act was a sovereign act or not. But it held that the rule of immunity based on the English law had no validity in India. After the

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Check Your Progress Questions

2 State of Rajasthan - V Vidywathi - Discuss

3 Peninsular and oriental steam Navigation Co V. Secretary of state of India.

(Space for Hints)

establishment of a Republican form of Government under the constitution there was no justification in principle or in public interest, that the state should not be held liable vicariously for the tortious acts of its servants. It is submitted that the law has been rightly laid down by the supreme court in Vidhyawati. Unfortunately, however, within a very short time, a clear departure was made in Kasturi Lal and the efficacy of the law laid down in Vidhyawati was considerably watered down by the supreme court.

Kasturialal – Vs. State of Uttrapradesh AIR 1965 SC 1039

In this case, Kasthurilal's gold was seized by the police under the suspicion that it was the stolen property. The gold was kept in the police Malkhana under the custody of a Head constable. He misappropriated the gold and fled to Pakistan. In an action by kasthurilal against the state for recovery of the gold or its equivalent value, the trial court dismissed the suit. On appeal, the supreme court upheld the Trial court's decision following the rule of sovereign; non-sovereign dichotomy laid down in to steam Navigation case. The above rule was followed by the Supreme Court in :

State of Uttar Pradesh V. Tulasi Ram, (AIR 1971 All. 162)

It is to be noted that the plead the immunity both the conditions stated above are to be satisfied. If either of the two conditions is absent, the state is liable as in the case of **Hindustan Lever Limited V. State of Uttar Pradesh,** (AIR 1972 All, 486)

Gross negligence by the Servant :

The Government / state is vicariously liable for the gross negligence of its servants. Relevant case on this point is : **Ramakonda Reddy V. State** (1989)

The A.P. High Court held the State liable to pay compensation. In this case, an under trial prisoner died due to negligence of the prison authorities. The court viewed that the sovereign immunity could no longer be applicable in cases for violation of the right to life and personal liberty guaranteed under Article 21 of the constitution.

Existing position in India and the Role of judiciary : The existing position in India with regard to the Government Liability is not certain. Hence Gajendra Gadkar C.J. in Kasthurilal's case expressed dissatisfaction over the lawlessness in respect of the state liability, the judiciary by exercising its discretionary power, removed the uncertainty in the following cases.

Check Your Progress *Questions*
4 Write Short Notes

In Rrdul Shah's case (AIR 1983 SC 1086)

(Space for Hints)

An acquitted person was detained in prison for more than 14 years. The supreme court directed the state to release him immediately and awarded exemplary damage of Rs. 35,000/-

In Sebastian M. Hongray V. Union of India (AIR 1984 SC 1026)

In Sebastian's case, two persons were taken to military camp by the army jawans. The Government failed to produce them before the court. The Supreme court awarded exemplary damages of Rs. 1,00.000/- each to the wives of the said two persons for having undergone torture, mental agony etc.

Saheli, A women's Resource centre V. Commissioner of Police, Delhi (AIR 1990 SC 513)

A child of 9 years was beaten to death by the police. The supreme court awarded a compensation of Rs. 15,000/- to the mother of the child.

The Government (Liability in Tort) Bill, 1967 :

In view of uncertainty as to state liability, due to lack for proper legislation, the law commission recommended the legislation enshrining various provisions relating to state liability. Consequently a bill entitled "The Government (liability in tort) Bill, 1967 was introduced in Lok Sabha in 1969. But it has not yet been passed into Law.

9.3. PRIVILEGES AND IMMUNITIES OF STATE

The general rules of litigation as applied between citizens is not applicable to government. Law allows certain privileges and immunities to the government as a litigant.

9.4. WHETHER THE STATE IS BOUND BY STATUTE?

The common law doctrine is that the king can do no wrong. This means that the king being the finder (maker) of law and fountain of justice, he is not bound by the laws made by him. Law is made by the king for his subjects.

The application of this doctrine was considered (whether the state is criminally liable) in ***Director of Rationing v. Corporation of Calcutta Municipality (1960).*** According to the Calcutta Municipality Act those who do not store food materials in premises without obtaining the licence from the corporation were liable to prosecution. The Director of Rationing was prosecuted for storing food stuff in an unlicensed godown. The question before the High Court was whether the State was bound by its own law. The court viewed that State is bound unless exempted by the statute in express words or by implication. But the Supreme Court, on appeal, applying the

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common law doctrine held that the state is not bound by its own law. The Court for this purpose relied on the Privy Council decision, *Province of Bombay V. Municipal Corporation of Bombay.*

But the Supreme court in *West Bengal V. Corporation of Calcutta,* (1968) held that the State is bound but its own statute unless it is expressly or impliedly exempted. So saying the fine imposed against the state was upheld. (That is, the State is liable criminally), The Court viewed that there is no crown rule in India, and therefore, such a privilege has no relevance in India. Besides, this is against the principles of rule of law. The Supreme Court affirmed this –decision in ***Union of India V. Jubbi,*** (1961).

9.5. PRIVILEGE TO WITHHOLD DOCUMENTS:

Parties before the Court must produce the documents in their custody when required by the court. In England if the disclosure (production of the document) would prejudice the interest of the public (State), it was left to the decision of the crown (Executive) to produce the same before, the court or not. Because the executive often misused this privilege. ***The Court in Conway V. Rimmer, 1961,*** held that the court can look, into the document and decide whether it is privileged or not. In U.S. the court can always review the decision of the executive.

In India this question came up before the Supreme Court in ***Gupta V. Union of India 1972.*** The court held that the executive is not the sole judge to decide this privilege. Whether there is any immunity (Privilege) attached to the document can be examined by the court.

Generally any document or material which is relevant for deciding a case has to be produced by the person who is in possession of it. But if the documents are unpublished official document, the government has the privilege to withhold it. S. 123 of the Evidence Act, 1872 provides for that no one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of state except with the permission of the officer at the Head of the Department concerned who shall give or withhold such permission as he thinks fit. This provision helps the government to withhold certain documents from the court.

There is the possibility of misuse of this privilege by the administration. In order to avoid such misuse Supreme Court laid down certain conditions in ***State of Punjab v. Sodlin Sukhadev Singh,*** 1. The claim of privilege should be in the form of an affidavit signed either by the Minister or the Secretary of the department; 2) The affidavit must indicate within permissible limits reasons why the disclosure would result in public injury and that the document in question has been carefully read and

considered and the authority is fully convinced that its disclosure would be injurious to public interest; and 3) If the affidavit is found unsatisfactory the court may summon the authority who signed the affidavit for cross examination. Applying this principle the Supreme Court in ***Awarchand v. Union of India*** *disallowed* the claim of privileges. Again in ***S.P. Gupta v. President of India***, government claimed the privilege to withhold the correspondence between Union Minister of Law and chief justice of India relating to tenure of additional judges. The court asserted the right to examine the document and after inspecting the correspondence the court came to the conclusion that its disclosure would not be prejudicial to public interest.

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9.6. IMMUNITY FROM ESTOPPEL:

We have already seen the principle, estoppel. The question for consideration here is to what extent administration is bound by the principle of estoppel? In other words, is the administration estopped later on from going against the advance representation given by it or from retracting promises it has made?

The general rule is that the doctrine of estoppel is not applicable against the government. Judiciary has consistently adopted the view that no estoppel was available against the government in this matter of operation of a statute. In ***Amarsinghji v. State of Rajasthan***, the collector had given an assurance that the Jagir of the petitioner would not be required by government during his life time, under the Rajasthan Land Reforms Act, 1952. Since this assurance was in clear violation of the provisions in the Act the Supreme Court refused to apply the doctrine of estoppel against the government. It is also well settled that estoppel cannot be applied when the government is exercising constitutional or a legislative power.

But in some cases the court applied the rule of estoppel against the government on equitable principles eg. ***Union of India v. Indo Afghan Agencies Century Spinning and Manufacturing Company v. Ulhas Nagar Municipality, M.P. Sugar Mills v. State of U.P.***, In these cases the court applied the doctrine of estoppel even against government. In ***Delhi University v. Ashok Kumar***, **Delhi High Court applied the** doctrine against University.

9.7. S.80 NOTICE UNDER CIVIL PROCEDURE CODE :

S 80 of the Civil Procedure Code provides that no suit shall be instituted against the government or against public officer in respect of any act purporting to be done by such public officer in his official capacity until the expiration of two months next after notice in writing in the mannei provided in the section has bear given. This requirement of notice is mandatory and allows no exception. But if the officer acted without jurisdiction this requirement need not be complied with. Law

Check Your Progress Questions

5 Explain with the help of decided cases the scope of privilege of the Government to withhold production of document

(Space for Hints)

Commission has recommended the abolition of this provision. With a view to relax this rule an amendment was made to the code of Civil Procedure in 1976. It provides that, a suit to obtain "an urgent or immediate relief" against the government or public officer can be filed with the leave of the court without serving any notice. But relief will be granted by the court without, giving to the government or the officer concerned the reasonable opportunity of showing cause in respect of the relief sought in the suit.

9.8. SUMMARY

Modern state has to carryout many Welfare measures for the benefits of the subjects. In that process it necessarily has to enter into different kinds of contract with the subjects. At the same time state as an administrator has to be vested with certain privileges and immunities also. In fixing the liability of the state, in contract, both these aspects have to be considered. The essential elements of a valid contract are dealt with in sec. 10 of the Indian contract Act. In addition to that, Article 299 of the constitution of India prescribes the essentials of a valid Government contract. If the contract government is not entered into in accordance with Art. 299 government the will be liable under Art. 300. Art. 298 of the constitution lays down that the executive power of the Union and States shall extend to the carrying on of any trade or business and to the acquisition holding and disposal of property and the making of contracts for that purpose.

9.9 KEY WORDS

Gazette	-	an official newspaper
contract	-	an agreement
Tort	-	It is an actionable civil wrong independent of a contract for which the remedy is by way of unliquidated damages
commit	-	give in charge
correspond	-	have due relation
sovereign	-	A chief or supreme person
affidavit	-	statement in writing and on oath
privilege	-	A right
bound	-	ready
Estoppel	-	When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief. Neither he nor his represention shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing. (sec 115 Indian Evidence Act)

9.10. ANSWERS FOR CHECK YOUR PROGRESS QUESTIONS

(Space for Hints)

For Question No.1 ... Refer Section No. **9.2.5**

Question No.2 ... Refer Section No. **9.2.5 (B)**

Question No.3 ... Refer Section No. **9.2.5 (A)**

Question No.4 ... Refer Section No. **9.1.C**

Question No.5 ... Refer Section No. **9.5**

9.11. MODEL QUESTIONS

A. Short answer questions

1. State liability – write short notes.
2. Act of State – write short notes.
3. Contractual liability of the state – write short notes.

B. Long answer questions

1. Discuss the liability of State in regard to the contracts signed by its officers.
2. Briefly explain the liability of state for the for tort committed by its servants.
3. Whether the state is bound by a statute? What is its position about documents and notice.

(Space for Hints)

UNIT – 10
PUBLIC CORPORATION

INTRODUCTION

In modern times, government is actively engaged in trade and commerce, since it is not possible for the private individuals to carry on heavy projects. In India, the commercial activities of the government is ever increasing. The government of India has enunciated the goal of setting up a socialistic pattern of society in the country.

To implement the goal, the government has introduced the nationalization of private sector enterprises and establishing monopoly for the state. In 1953, air transport was nationalized. In 1956, the life insurance business was taken over by the government. The enterprises of the central government are run departmentally and through the statutory corporations. These are characterized as public undertakings.

According to the Prof. Wade, "A public corporation is a hybrid organism, showing some of the features of a government department and some of the features of a business company, and standing outside the ordinary frame work of Central or local government".

Justice **Mathew in Sukhadev Singh.V. Bhart Ram** (AIR 1975 S.C. 1331) has stated that "Public Corporation is a new type of institution which has sprung from the new social and economic function of government and that it therefore does not neatly fit into old legal categories. Thus the corporations are semi-governmental autonomous bodies, primarily concerned with managerial, commercial and industrial enterprises and run various public utilities which the state does not choose to run departmentally as its normal Government function.

OBJECTIVES

- To understand the definition of Public Corporation and its characters
- To discuss the classification of Public Corporation
- To study the Rights and diabilities of Public Corporation
- To understand the control over the public corporations.
- To analyse the role of ombudsman.

UNIT STRUCTURE

10.1 Definition of Public Corporation and Reasons for its growth.

a. Definition

b. Reasons for its growth

10.2 Salient features of Public Corporation

10.3 Classification of Public Corporation

10.3.1 Commercial Corporation

10.3.2 Development Corporation

10.3.3 Social Services Corporation

10.3.4 Financial Corporation

10.4 Government companies (or) working of Public Corporation

10.4.1 Damodar Valley Corporation (D.V.C)

10.4.2 Oil and Natural Gas Commission (O.N.G.C)

10.4.3 Reserve Bank of India (R.B.I)

10.4.4 Life Insurance Corporation of India (L.I.C)

10.4.5 State Trading Corporation (S.T.C)

10.4.6 Road Transport Corporation (R.T.C)

10.5 Rights and Duties of Public Corporation

a. Rights

b. Duties

10.6 Liabilities of Public Corporations

10.6.1 Liability in Torts

10.6.2 Liability in contracts

10.6.3 Liability for crimes

10.7 Controls over Public Corporations

10.7.1 Parliamentary control

10.7.2 Government control

10.7.3 Judicial control

10.7.4 Public control

10.8 The Ombudsman

10.8.1 Meaning

10.8.2 Definition

10.8.3 Historical Background

10.8.4 In Newzealand

10.8.5 In England

10.8.6 Difference between Newzealand and British Ombudsman

(Space for Hints)

10.8.7 Reasons for creation of Ombudsman
10.8.8 Object
10.8.9 Lokpal and Lokayukta in Indian ombudsman.
(i) Appointment of Lokpal
(ii) Appointment of Special Lokpal
(iii) Lokayukta – The State Ombudsman
10.8.10 The central vigilance commission
10.9 Summary
10.10 Key words
10.11 Answers to check your progress
10.12 Model Questions

(Space for Hints)

10.1 DEFINITION OF PUBLIC CORPORATION AND REASONS FOR ITS GROWTH

a. Definition

There is no precise definition to the expression "corporation" either in the statutes or in the judicial decisions. Public Corporation means a body established by or under a statute and is owned or controlled by the state and which is entrusted with various developmental, Managerial, or economic functions of public importance. It is a hybrid born to a father – government department, and a mother – business company, having both features of a government department and a business company

b. Reasons for its growth

(i) The main reasons for its tremendous growth is the change in the government Philosophy from the "Laissez fair" concept to the "Social Welfare State". The multifarious functions of the modern Welfare state cannot be discharged through the government department alone. Thus for doing various functions of the government a number of public corporations have been created.

(ii) The Directive Principles of State Policy [(Art. 38 (b) & (c)] which requires the state to adopt a policy towards securing the ownership and control of material resources of the community are so distributed as best to serve the common good and the operation of system does not result in concentration of wealth and Means of production to the common detriment. To achieve this goal the government has also entered the commercial world through various public corporations.

(iii) The Industrial Policy Resolutions 1948 of the government was strongly in favour of public corporation for the Management of State enterprises.

Check Your Progress Questions

1. What are the different types of Public Corporation?

(iv) Administrative Reforms commission 1967 also recommended the creation of Public corporation for government's commercial activities.

(Space for Hints)

10.2 SALIENT FEATURES OF PUBLIC CORPORATION

1. Public corporations are generally created by some statute for some specific purpose. In the statute itself rights, duties and obligations of a corporation will be laid down.

2. It has separate corporate personality and legal entity. So it can sue or be sued by its name for contracts and torts etc. public corporation can hold and dispose of property.

3. Public Corporations are autonomous in its day to day administration and financial matters.

4. All the rules framed by the Corporation relating to appointment, service conditions, termination etc., in accordance with the power delegated by the statute are binding on the Corporation and its employees.

5. Its employees are neither public servants nor civil servants but they are entitled to the protection of Art. 311 (2) of the Constitution. (**Sukh Dev Sing .V. Bhagatram,** AIR 1975 S.C. 1331).

6. Sec. 80 of the civil procedure Code is not applicable to public undertakings. That is, two months notice before filling a case against government. So a case against it can be filed without giving two months notice to it.

7. A public corporation, is a 'state' within the meaning of Art. 12 of the constitution, and therefore is subject to the writ jurisdiction of the Supreme Court and High courts under Arts. 32 and 226 of the Constitution. Therefore fundamental rights can be claimed against a Corporation.

R.D. Shetty .V. National Airport Authority (1979. 3 S.C. 489). However, a Corporation is not a citizen within the meaning of the Citizenship Act, 1956. So it cannot the fundamental rights given in the Constitution.

8. Art 299(1) of the constitution (formalities for a government contract) is not applicable for contracts entered by the public corporations.

9. For the purpose of the part – III of the constitution (Fundamental Rights) it is being treated as a state (under the heading other authorities mentioned in Art. 12). Hence the public corporation is amenable to the writ jurisdictions of the

Check Your Progress Questions

2 What is meaning of Public Corporation?

(Space for Hints)

10. It is not a citizen (but it is only a legal person) within the meaning of citizenship Act, 1956. So it cannot claim those fundamental rights which are guaranteed only to the citizens.

11. It is always bund by the operation of other laws unless it is expressly or impliedly excluded from the operation of such Laws.

12. It has no privilege to withhold any of its documents from producing before the court when it is required by the court because it largely undertakes only commercial activities.

13. Public corporation is vicariously liable for the tort committed by its servants. But certain statutes confer immunity from tortions liability to the corporations and its servants with regard to the acts committed by them in good faith is discharge of their duties. (Eg.) S. 20 of the oil & Natural Gas commission Act. 1959.

10,3 CLASSIFICATION OF PUBLIC CORPORATION

It is not possible to categorize public corporations uniformily. They, differ in form and functions, yet they can be classified according to the nature of functions they carry out. They public undertaking may be broadly classified as;

10.3.1 Commercial Corporation

This classification includes those corporations, which carry on commercial and industrial functions. State Trading corporations, Hindustan Machine Tools Ltd., Indian Airlines corporation and Air India are some of the commercial corporations.

10.3.2 Development Corporation

Development Corporations are those which encourage National Progress by undertaking developmental work in the country. Oil and Natural Gas commission. Food corporation of India, National small Industries corporation, Damodar valley corporation, River Boards, ware housing corporations, National Research Development Corporation Ltd., Rehabilitation Housing Corporation Ltd., etc. are Development Corporations.

10.3.3 Social Services Corporation

Corporations which have been created for the purpose of providing certain essential services to the people, like transporation, electricity, communications, energy, etc. are social services corporations. This objectives of such corporations is to provide services to the community economically and efficiently and earning profits is not the primary aim. Hospital Boards, Employees' state Insurance Corporation, Housing Board, etc. are included under this classification.

Check Your Progress Questions

3. What is the main reasons for the growth of Public Corporation?

10.3.4 Financial Corporation

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Under this classification one may include such corporations as Reserve Bank of India, State Bank of India, Industrial Finance Corporation, Life Insurance Corporation of India, Film Financing Corporations, Industrial Reconstruction Bank, Unit Trust of India, etc. These bodies advance loans to institutions carrying on trade, business or industry on such terms and conditions as may be agreed upon.

10.4 GOVERNMENT COMPANIES (OR) WORKING OF PUBLIC CORPORATION

Apart from corporations, the governments carries on its commercial and service functions through non-statutory companies registered under the companies Act, 1956. These are limited liability companies where the government holds the majority share capital. They are formed either to start a new venture or to take an existing business.

Sec. 617 of the companies Act, defines a government company as "any company in which not less than 51% of the paid up share capital is held by the Central government or by the state government or partly by the central government and party by one or more state government and includes company which is subsitiary of a govt. company." After registration a government company like any other company, is considered as a distinct legal person with perpetual succession and common seal. It is controlled by the government which can appoint and remove its directors.

A government company is not a state within the meaning of Art.12 of the constitution. Its employees are not government servants within the meaning of Art.311 of the constitution.

Since a government company is neither a creation of a statute nor a department or an agent of the government, it is not subject to the writ jurisdiction of the High court under Art.226 of the constitution (**R.Lakshmi .V. Neyveli Lignite corporation,** A.I.R. 1966 Mad. 399). However a writ of mandamus would lie against a government company to enforce a statutory or public duty required by the statute.

Though the government company is a distinct legal person separate from its members, yet in order to mitigate hardship to its members or private individuals, the courts may provide the remedy by lifting the corporate veil, so that the real nature of the company may be determined and the liability may be fixed. A government company would be subject to all those limitations which are imposed by the companies Act.

Next, we shall discuss the companies the composition and functions of some of the important public corporations in India.

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10.4.1 Damodar Valley Corporation (D.V.C)

It is constituted under the Damodar vally corporation Act, 1948. It consists of chairman and two members. They are appointed by the Government of India. Members are whole time servants of the corporation. All other officials of the corporation are appointed by the corporation. The corporation can acquire and hold property. It is corporate body and has a common seal. The corporation entrusted with the work of promotion and operation of irrigation schemes in the Damodar River vally.

In Damodar Valley corporation.V. State of Bihar it was held that the corporation is liable for central taxes on its income and is deemed to be a dealer under the sales tax laws of the states of Bihar and West Bengal under the central sales tax Act, 1956.

10.4.2 Oil and Natural Gas Commission (O.N.G.C)

The body corporate was established in 1956. the chairman and the members are appointed by the central government which also has the power of dismissal. It can acquire, hold and dispose of any property as its own instance. It is deemed to be a company for the purpose of taxation. Can sue and is liable to be sued. It is for public purpose and can borrow money in the open market. Its chief functions are to carry out geological survey for explorations of petroleum, implementation for the development of petroleum resources and the sale of petroleum products produced by it.

10.4.3 Reserve Bank of India (R.B.I)

The Reserve Bank of India was established under the Act, II of 1934. It is perceptual body. Its affairs are managed by a Board of Directors consisting of the Governor, two Deputy Governors and a number of directors etc. Its object is to issue bank notes and keep the reserve for securing monetary stability. The other object is to operate the currency and credit system and serving as bankers of the government. The Reserve Bank of India has power over the banking business of the country. Without a licence from Reserve Bank no company is eligible to do the banking business. It has power to enquire into the affairs of any bank and Inspect their books either on its own or on the instructions from the central government.

10.4.4 Life Insurance Corporation of India (L.I.C)

The Life Insurance Corporation of India Is a nationalized, institution carrying on life insurance business. It was established by an Act in 1956. Its other businesses, include capital redemption business, re-insurance pertaining to life insurance. It

gives money on loans and invests its funds. All the earlier life insurance companies were taken over by the life insurance corporation along with their assets, and liabilities. It is a body corporate, having perpetual succession. It can acquire, dispose of or hold property. The corporation is free from governmental interference and in policy matters the central government may give instructions.

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10.4.5 State Trading Corporation (S.T.C)

The Corporation though a body corporate is a concern of the Government of India in which is vested the legal and beneficial ownership of the Corporation. The government provides 98% of its subscribed capital. It is registered in the name of the President and the Joint Secretary of the Commerce Department.

Its object is to organize and undertake and trade generally with the State Trading Corporations as well as the other Countries in commodities entrusted to it for such purposes by the Union Government from time to time and to undertake the purchase, sale and transport of such commodities in India or any where else in the world. It is constituted under the Indian Companies Act.

It functions under the supervision of the Government of India. It is purely a Commercial Corporation. It is not a part of the government eventhough the minister makes the appointment of the members and is entitled to call for information and supervise the conduct of the business.

10.4.6 Road Transport Corporation (R.T.C)

This Corporation was established by the Act of 1950. Under this Act the Corporation may be established by a State Government for the state or part of the state concerned. A notification setting up the Corporation is published in the Official Gazette. The State Government appoints the managing body consisting of the chief executive officer, a general manager and a Chief accountant. The capital is provided by the Central Government and the State Government concerned in definite shares. Capital of the corporation can be raised by Issue of shares. However these shares are not transferable. The capital shares and dividend are guaranteed by the government.

10.5 RIGHTS AND DUTIES OF PUBLIC CORPORATION

A. Rights of Public Corporation :

A Public corporation enjoys legal entity and therefore, like a legal person, it can sue for the enforcement of its legal rights It should, however, be noted that it is not a natural person, but merely an artificial person. Being an artificial person, a public corporation exists only in contemplation of law. Therefore it cannot / be said to be a citizen within the meaning of citizenship Act, 1955. Accordingly, a corporation cannot claim any fundamental Right conferred by the constitution only on citizens.

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All the same the company's share holders, being citizens, can claim protection of those fundamental rights. A company can maintain a petition for the reason that the rights of a shareholder and the company which the shareholders have formed are rather co-extensive and denial to one of the fundamental freedoms would be denial to the other. There is no controversy on the point that a public corporation can claim the benefit of Articles 14 and 16 of the constitution.

An interesting question which arises is whether fundamental Rights conferred by the constitution on a person or a citizen can be enforced against a public corporation. In this respect, the position is that a public corporation falls within the category of 'other authorities' within the meaning of Article 12 of the constitution and therefore, fundamental Rights can be enforced against Public Corporations.

B. Duties of Public Corporation

A statutory corporation being an instrumentality of the state must exercise its powers in just, fair and reasonable manner. Its approach must be beneficial to general public. It must act bona fide. Wide powers conferred on corporations are subject to inherent limitations that they should be exercised honestly and in good faith.

10.6 LIABILITIES OF PUBLIC CORPORATIONS

10.6.1 Liability in Torts

A public undertaking is a separate legal entity from government. It can not claim the immunity available to the state under Art. 300 of the constitution. Consequently it is liable for torts committed by its servants. No sovereign function can be attributed to a public corporation so as to claim any immunity (**Sudhakar.V Mysore state Road Transport corporations**). If the statute creating the corporation confers any immunity then court will enforce such a provision unless it is ultravires of the constitutions. The government is in no way liable for the torts of public undertakings of their servants.

A corporation can use sue for tors committed by a person against it. It can also sue for slender provided it affects its business. A public undertaking or a corporation is liable for offences committed by its servants who are its organs.

In M.C. Mehta v. Union of India (1987) 1 scc 395)

Oleon gas had escaped from shriram chemical and fertilizer company, Delhi, causing injury to people. The Supreme court held that the liabilities of industries engaged in hazardous or dangerous activities are absolute even when the injury occurs on account of an accident in such activities. Making the rule of strict liability absolutely strict, the court observed that an enterprise which in engaged in hazardous

or inherently dangerous industry owes an absolute liability to the community to conduct its affairs with the highest standards to safety and to compensate if harm is caused to any one due to accident.

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10.6.2 Liability in contracts

A corporation can sue or to be sued for breach of a contract entered into by it with any person. The requirement of a valid government conduct under Art. 299 of the constitution does not apply to statutory undertaking. It cannot claim the privilege of notice under sec.80 C.P.C. It can not enter into contracts arbitrarily with private parties or contrary to be the provisions of the statute which created it. It will be a void contract and it cannot be enforced against third party. (**U.P. Electricity Board .V . Lakshmi Devi** A.I..R. 1977 AII . 499).

10.6.3 Liability for crimes

A public corporation may also incur liability for offences committed by its servants in the course of employment. However, since it is an artificial person having corporate identity, it cannot be punished with death or imprisonment. It follows that a corporation cannot be found guilty of an offence for which the punishment is death or imprisonment. A corporation can also not be held liable for an offence which can only be committed by a natural person, e.g. bigamy.

But a public corporation can be held vicariously liable for offences committed by its agents, servants and employees, e.g. bigamy.

But a public corporation can be held vicariously liable for offences committed by its agents, servants and employees, e.g. Libel, fraud and Public nuisance.

10.7 CONTROLS OVER PUBLIC UNDERTAKINGS

10.7.1 Parliamentary Control

Public corporations are created by statute passed by the parliament. The statute determines its constitution, object, functions and so on. The parliament's control is more significant by discussion in annual account and reports submitted by them to parliament. Members used to ask questions about the functioning of public corporation.

The statutes creating a corporation may prescribe that the rules, regulations, financial statements and audit report be laid on the Table of the house. This provides on opportunity for the parliament to scrutinize the functioning of a corporation.

The parliament has constituted a committee on public under takings in 1964. In consists of 22 members. 15 from the Lok Sabha and 7 from the Rajya Sabha. It is appointed for the period of one year. Its functions include the examination of reports

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and accounts of the corporation and the report of the Controller and Auditor –General on public undertakings. It also undertakes the examination of the entire working of the corporation to find out whether the affairs of the corporation are being conducted in accordance with the policy of the government and rules of commercial accountability. Thus, the real and effective parliamentary control is exercised through the committees of parliament.

10.7.2 Government Control

In order to ensure that the affairs of the statutory corporations are conducted in the best interests of society, governmental control over public corporations is highly necessary. The governmental control is not uniform over all statutory corporations. The nature and the extent of control depends on the provisions of the statute creating the corporations.

The statute creating the corporation may provide for appointment and removal by the government of the authority managing the affairs of the corporation. For instance, the Reserve Bank of India Act lays down that the governor of the Bank shall be appointed by the government and may also provide that the government shall the power to dissolve the corporations. This gives ample power to the government to ensure, that the corporations functions according to the policy of the government and in the best interest of the society.

Power to issue directions: the statute may authorize the government to issue directives to public undertakings on maters of 'policy'. This is mainly ensure that the affairs of the corporation are conducted in accordance with the policy of the government. Delhi Transport undertaking Act empowers the government to issue specific directions on such matters like wages, terms and conditions of service of the employees etc.

As a technique of governmental control, the directions can prove beneficial only if it serve as directions to the corporation. On the other hand, if the government through directions, interferes with the day to day functioning of the corporation, it would be a self-defeating technique.

Finance:

The government exercise effective control over a public corporation when such corporation is dependant on the government for finance. In some cases the whole capital of thee corporation may be provided by the government. For instance, the total capital of the Life Insurance Corporation, is provided by the government. The statute may invest the government with the power to control capital formation, borrowings and expenditure .Damodar valley corporation Act makes provision for the approval of the government in cast of borrowings and capital investment. The

Air Corporation Act provides for control of expenditure by the government. Further the controller and Auditor General exercises control in the mater of audit accounts submitted by public corporations.

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10.7.3 Judicial Control

Since a public corporation is a legal entity, it can sue and be sued like any ordinary person. Legal proceedings may be taken by or against a Corporation in its corporation name. A statutory corporation is a state within the meaning of Act. 12 of the constitution and is, therefore, subjects to the writ jurisdiction of the Supreme court and the High courts. It is also liable for the torts committed by its servants and is also liable for damages in case of breach of contract.

If an undertaking is to discharge a public or statutory duty writ of mandamus would lie for the enforcement of such duty. **In Corporation of Nagpur.V. Nagpur Electric Light & Power Co.** the writ of mandamus was issued against a public utility undertaking to compel it to supply electricity to the Corporation. In matters of suit, the statutory Corpöration is not entitled to any of the privileges and immunities of the state. Court can also control the action of the corporation in cases of lack of jurisdiction excess of jurisdiction and abuse of jurisdiction at the instance of any person who is adversely affected by such actions.

10.7.4 Public Control

Corporations and companies are instrumentalities of the state to undertake various programmes for the benefit of the people. Hence, it is desirable that these instrumentalities must respond to the need and the opinion of the people. Consequently the public have good interest in the properly running of these instrumentalities of the government. But public opinion in India is not organized. Mass media, consumer organization and interest representation are effective public control over these agencies.

The mass media in any free society, through newspaper, radio and television not only reflects public opinion but also creates public opinion by the informative and investigative journalism. By exposing corruption and inefficiency, political interferences, working to public corporation and undertakings can be made to respond to the needs of public interest. Though there are nearly 600 public enterprises in India, unfortunately no special attention is made by the mass media on these aspects. They appear to be more interested on political personalities, cinema, sports, etc. The mass media in India has not been able to establish its role of exercising control over the affair of the public bodies in the public interest.

Check Your Progress Questions

4 Write few lines on control of Public Corporation by Judiciary

Regarding consumer organization, in India, it is still infantile stage to operate as an effective check on public corporations. In countries like U.S,A and Japan consumers are well informed and organized their organization provide an effective check on the planning, policies and actions of public bodies.

In U.S.A consumer organizations are powerful and to on several occasions the corporation has to bring down the prices of their commodities because consumer organization decide not to purchase their products. Through such organization the consumers also make their views known to the corporations. In England consumer councils have been established in the electricity, gas and coal industries under a statute. However, in India this type of organization is almost non-existent because the consumer are unorganized and still to learn to work in groups. Of course the government of India have enacted consumer protection Act in 1986, and established consumer council at various level to protect interest of the consumers. In order to make public bodies directly responsive to consumers, it is desirable that some pattern of consumer machinery must be evolved for every public undertaking. So that real consumers will have some say in the policy planning and actions of such bodies. Therefore in Britain the parliament by law requires that members of certain public corporations are to be nominated by local bodies or these bodies interested in the working of a particular corporation. However, the place of interest representation as a tool to control public corporations, in India, is yet to be fully appreciated and recognized. Without any hesitation, we can say, public control of corporations is really feeble in India.

10.8 THE OMBUDSMAN

10.8.1 Meaning

'Ombudsman' is scandinavian word. Etymologically, it means 'a delegate or an agent'. Ombudsman is an officer of the parliament to investigate misuse of administrative power by the Executive, to safeguard and citizens.

10.8.2 Definition

Garner in his 'Administrative law' defines 'ombudsman'. He is an officer of parliament, having as his primary function, the duty of acting as an agent for parliament, for the purpose of safeguarding citizens against abuse or misuse of administrative power by the executive".

10.8.3 Historical Background

For the first time in 1809, the Institution of Ombudsman came into existence, in Sweden. It was instituted first against monarch and then against administration. Later in 1919 it was followed by Finland, followed by Denmark in 1953 and Norway in 1953. Newzealand and England adopted in 1962 and 1967 respectively.

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Ombudsman literally means 'a delegate or agent'. In Sweden, Denmark and Norway the Ombudsman is chosen by the Parliament and is responsible to that body. The Ombudsman watches the public servant and sees that they do not injure, that body (government). He can act very quickly and afford immediate redress. He was endowed with enormous powers. He has access to department files. Whenever a complaint is made to him by an individual, first he satisfies himself by looking into relevant papers. While filing a complaint with the ombudsman, court fee is required. He can seek state files and call even the P.M. to account.

Usually the ombudsman is a Lawyer, Professor or Judge with the political or financial background. He is paid very well and is elected for a period of four or five years. He makes a detailed annual report to the Parliament and he sets out the reactions of the people against the government.

10.8.4 In Newzealand

In Newzealand, a person feeling aggrieved by the administrative action may complain before the ombudsman with a fee of 1. The ombudsman is empowered to waive this fee, if the complainant is a poor person. The ombudsman is empowered to investigate in respect of any matter on the part of a department placed under his jurisdiction. Where the complaint appears to be trivial, frivolous, or vexatious, the ombudsman may refuse to take action. Whenever the complainant has an adequate alternative remedy or right of appeal under the law, the ombudsman may refuse to investigate the matter.

In England the department and the official against whom investigation is initiated should be informed. The investigation is held privately.

If the report of the ombudsman adversely affects the department or official concerned then the department or official must be given an opportunity of being heard. No appeal will lie to any authority or court from the decision of Ombudsman except on the ground of lack of jurisdiction.

The Ombudsman in Newzealand has given relief to several complainants and has done good deal of work.

The Ombudsman does not make any executive order. He sends a recommendation to the department concerned and department takes action on its recommendation. He may report to the Parliament. The department implements the recommendation of the Ombudsman invariably.

10.8.5 In England

Let us now discuss the position of Ombudsman in England. The British Ombudsman is mainly concerned with mal-administration in administrative field. A

> ***Check Your Progress* Questions**
>
> 5 Who is an Ombudsman?

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person complaining of any persons injury by an administrative action can send the complaint to the Parliamentary Commission through a member of Parliament.

The British Ombudsman or Parliamentary Commissioner is not authorized to examine the merits of a discretionary decision taken by a department without involving elements of mal-administration. The ministers may prevent disclosure of information by the Commissioner if the safety of the state or public interest involves in it.

Due to administration action. if any personal injury is caused, the affected person may send a complaint to the Commissioner. However the complaint should be sent through a member of the House of Commons. When the Ombudsman proposes to conduct an inquiry in pursuance of the complaint, he gives an opportunity to the defendant to comment on any allegation made by the complainant. Usually the Ombudsman investigates in private and adopts such procedure as he may consider appropriate in the circumstances of the case. The Ombudsman has the power to call for evidence from any minister, department or person. The crown cannot claim any privilege in respect of the production of documents or giving of evidence which the crown enjoys in legal proceedings. However, a person cannot be compelled to produce any document or give any evidence before the Ombudsman, which he could not be compelled to give or produce in court.

The Commissioner is required to send a report of the results of the investigation to the department concerned. If he comes to the conclusion that injustice has been caused to the complainant due to mal administration, a special report upon the case may be placed before each House of Parliament.

Generally, the Ombudsman submit a general report on the performance of his functions before the Parliament. The Parliament has set up a select committee for considering the report of the Ombudsman. He also suggests measures for improving administrative practice.

10.8.6 Difference between Newzealand and British Ombudsman

Now, let us see the difference between Newzealand and British Ombudsman. In Newzealand the Ombudsman hears complaints directly from the public. Whereas the British Ombudsman requires that the complaint should be sent through a member of the House of Commons. Because of this restriction, public cannot make all complaints to Ombudsman.

The grounds on which the Ombudsman in Newzealand can interfere into administrative actions are wider than the Ombudsman of England. In England, he can interfere if the element of mal administration is present. So we can say that the

British Ombudsman exercise a narrower jurisdiction than the Newzealand Ombudsman.

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10.8.7 Reasons for creation of Ombudsman

The Institution of ombudsman is created because of the failure of the judiciary, Parliament and the Executive to control the misuse of administrative power. Following are the main reasons.

1. Courts do not review the facts decided by the administrative authorities.

2. The burden of proof lies on the Individual challenging the administrative action. It is very difficult for him to prove, since the Government enjoys certain privileges.

3. The discretionary powers conferred on the ministries enable them to escape from the judicial review. In order to have an internal administrative check, the institution of ombudsman has become a necessity.

10.8.8 Object

The Main purpose of creating the institution of Ombudsman is to control mal – administration.

10.8.9 Lokpal and Lokayukta in Indian Ombudsman

The successful functioning of the Ombudsman system in the. countries like Newzealand, Britain, Denmark, Sweden etc., inspired the Government of India also to establish such an institution on similar lines. On the basis of the recommendation made by the Administrative Reforms Commission the government prepared the Lokpal and Lokayukta Bill and introduced the same in the Parliament in 1968. Unfortunately the bill lapsed because of the dissolution of the Parliament in 1969.

Once again in 1971 the bill was introduced but it met with the same fate. Then in 1977 another attempt was made and the bill was reintroduced with major changes. Unfortunately again the bill lapsed because of the dissolution of the Parliament, during Prime Minister Morarji Desai's regime. In that bill the jurisdiction of the Lokpal was confined only to public men i.e., Central Ministers, M.Ps and M.L.As of union territories and few other elected representatives. However, the Government Servants were excluded from its jurisdiction. The word mal administration was replaced by the word political corruption.

To know more about the Lokpal, and its functions and powers, let us refer to the provisions of the 1977 Bill, in detail.

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The Lokpal has the power to enquire into any matter involved in or arising from or connected with any allegation of misconduct against a public man. The word public man had been defined in the Bill as a person who holds or has held the office of (1) a member of the Council of Ministers for the union (2) a member of either House of Parliament (3) a member of the Council of Ministers of a union territory and other persons as described in the Act and includes a Prime Minister. Though it included the Chief Ministers, the Joint Committee recommended their exclusion. The acts of secretaries the other officials below the rank of Secretary were also covered by the 1971 Bill. However, 1977 Bill excludes the officials from the purview of the Lokpal.

The Lokpal cannot enquire into any matter concerning any person if he has any bias in respect of such matter on person or any matter which has bean referred for enquiry under the Commission of Inquiry Act, 1952. Further. if a complaint is made against a public servant after the expiry of five years from the date of misconduct, the Lokpal cannot enquire into such allegation of misconduct. But, he may entertain such complaint even after five years, on being satisfied that there was sufficient cause for not making the complaint within the said period.

(i) Appointment of Lokpal

The appointment of Lokpal is made by the President of India after consulting the chief Justice of India, the chairman of Rajya Sabha and the Speaker of the Lok Sabha. He shall not be a member of Parliament or of any state legislature and cannot hold any office of trust or profit. If he holds any other offices, he must give them up before he assumed the office of Lokpal. He shall hold, office for five years. He may resign or be removed from office. He is not eligible for any other appointment after he cases to hold the office of Lokpal. The procedure for removal of the Lokpal is the same as that of the Judges of the High Court and the Supreme Court.

(ii) Appointment of Special Lokpals :

For the speedy disposal of complaints the President may appoint special Lokpals. The procedure of appointment is similar to that of the Lokpal. Such special Lokpals shall hold office for a period of five years. If he is appointed for a lesser term he is eligible for reappointment. But the total period can never exceed, five years.

Any person other than a public servant can make a complaint to the Lokpal. A complaint against a legislator shall be made to the chairman of the Rajya Sabha or to the speaker of the Lok Shabha as the case may be. The complainant has to deposit Rs. 1000/-. But the Lokpal may exempt a person from depositing the amount. A letter written by a person in a jail or in any asylum may be treated as a complaint.

The lokpal may dismiss a complaint on the ground that it is more than five years since the happening of the event or the complaint is frivolous or vexatious or on the ground that there are not sufficient grounds for inquiring into the complaint. If he decides to hold an enquiry "the Lokpal shall forward a copy to the competent authority and make orders for the safe custody of the relevant documents. He may forward a copy of the complaint to the public man referred to in the complaint and give him an opportunity for rebuttal. The Lokpal shall have the powers of a civil court for the purposes of conducting enquiry. He can call upon a public servant or any other person to furnish any information or to produce documents relevant to such enquiry. The Lokpal may seize any document from any place and keep it till the completion of enquiry.

If the Lokpal comes to the conclusion that the allegation made is not substantiated wholly or partly he shall close the case and inform the complainant and the competent authority. On the otherhand, if the allegations can be supported wholly or partly, he shall communicate his finding to the competent authority. After examining the report, the competent authority shall within three months communicate the action taken or proposed to be taken on the basis of the report. Every year the Lokpal shall present an annual report to the President on the administration of the Act. On receipt of the report, the president shall present a copy of the same with an explanatory note before each House of the Parliament.

Though the Bill of 1977 was not passed, a similar Bill was introduced in 1985 in the Parliament. This Bill has been referred to joint select committee of Parliament. The 1985 Bill deals with allegations of corruption against Union Ministers and the Lokpal's jurisdiction is limited to 'public functionaries' who are described as "persons who hold or have held the office of a Minister, Minister of State, Deputy Minister, Parliamentary secretary of the Union". The present Bill specifically excludes from the Lok Pal's jurisdiction, the President, the Vice-President, speaker of the Lok Sabha, Chief Justice and other judges of the Supreme Court, the Controller end Auditor General of India, Chief Election Commissioner. Prime Minister was also excluded from the jurisdiction of the Lokpal. The exclusion of the highest executive of the land was objected by the opposition parties. The 1985 Bill also provides power to the Lokpal to punish persons making frivolous and malicious complaints, with imprisonment and fine.

The most encouraging aspect of the Bill is the mandatery provision requiring the Prime Minister (comperent authority) to communicate to the Lokpal within three months of the receipt of his report the action taken or proposed to be taken on the basis of his findings. This is similar to 1977 Bill. The Lokpal's reports are to be

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placed on the table of the Houses of Parliament which would enable a close parliamentary scrutiny.

You would have noted that the earlier attempts in 1968/1971 and 1977 to pass legislation constituting Ombudsman type watch dog (i.e. Lokpal, proved abortive for one reason or the other.

(iii) Lokayukta – The State Ombudsman

Based on the provisions of the Bill introduced in 'Lok Sabha, several states in India enacted similar statutes. Several states have enacted Lokayukta statutes and created the Ombudeman type of body for their states. Thus in Orissa it was enacted in 1970, Maharastra-1971, Rajasthan-1973, Bihar- 1973, U.P. 1973, Karnataka-1973, Gujarat-1974 and in 1983 Andhra Pradesh followed by Himachal Pradash, Kerala and Madhyapradesh.

To know the salient features of the state law, let us refer to the provisions of the Lokayukta created in 1983 by the Andhra Pradesh Government. Andhra Pradesh passed the Lokayukta and Upa-Lokayukta Act in 1983 'Lokayukta's jurisdiction extends to investigate all actions done by Minister, except Chief Minister, Secretaries, M.L.A's and mayors of the Corporations. However all judicial officers, Public Service Commission chairman and its members. Speaker and Deputy Speaker are outside the purview of the jurisdiction of Lokayukta.

The object of the Act is to check the abuse of public power or corrupt motives of the above said persons. The complaint should be made to it within 6 years from the alleged misuse of power. After the enquiry, if the complaint is proved the Lokayukta will make a report of his findings to the competent authority, recommending the action to be taken. The competent authority must report back about the actions taken on the recommendation of Lokyukta within 3 months. If the Lokyukta is not satisfied with the actions taken, he can make a report to Governor and also inform the complainant. Annual report of its working will also be sent to the Governor.

Further, it may be noted that under the Act, Upalokayukta can be created, and it will have the powers and functions similar to that of Lokayukta. It will have jurisdiction over public servants who are not included under the jurisdiction of Lokayukta.

10.8.10. The Central Vigilance Commission

The Central Vigilance Commission was constituted in February 1964 by a resolution of the Government of India to strengthen the existing machinery for checking corruption amongst government servants. The commission was established

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on the recommendation of the committee on prevention of corruption, known as Santhanam committee. The Committee had recommended that the commission should be concerned with the two problems facing the administration. They are (1) Prevention of corruption and maintenance of integrity amongst government servants and (2) ensuring just and fair exercise of administrative powers vested in various authorities by statutory rules or executive orders.

The Central Vigilance Commission has no jurisdiction over State government employees. The commission has jurisdiction to enquire into the cases of corruption among central Government employees; employees of union territories, employees of public sector undertakings, statutory corporations and port trust etc. Further, the commission's Jurisdiction extends only over officers drawing a basic pay of Rs. 100 and above.

The central vigilance commission is to be appointed by the president. He shall hold office for a period of three years, however the president may extend his term in public interest for not more than two years. The vigilance commission is attached to the ministry of Home affairs, but it is not subordinate to any ministry or department. It has the same independence and autonomy similar to the U.P.S.C.

Its main concerns are corruption, misconduct, lack of integrity or kinds of malpractices by government servants. Its decisions are mandatory and binding on the government. The commission's work is helped by a preliminary reference to the C.B.I. for investigation. The reports of the C.B.I. and reports to inquiry conducted by the department will be the basis for the commission to make its recommendation.. It can also depute one of its members to make departmental inquiry. An annual report is submitted to the ministry of Home Affairs, by the commission. The Home ministry places a copy of the report, before the parliament, together with the government's memorandum stating the reasons for non-acceptance of any recommendation of the commission. It is for parliament to consider all these and if necessary give directive to the government.

10.9 SUMMARY

In view of the change in the Government philosophy from the 'Laissez faire' to the social welfare state, there has been tremendous growth and development of public undertakings and corporations. Article 298 of the Indian Constitution empowers the Union of India and states to carry on any trade or business by entering into contracts through its executive powers. The trade or business may be carried on by the Government through the public undertaking (or) Public corporations. This topic covers.

(Space for Hints)

1. Definition of Public Corporation and Reasons for its growth.
2. Salient features & Classification of Public Corporation.
3. Rights and Duties of Public Corporation.
4. Finally which topic discussed the Liabilities, and control over the Public Corporation.
5. We discussed ombudsman also.

10.10 KEY WORDS

Libel	-	Defamation in a permanent form.
Affairs	-	Business of any kind. Commercial, Professional or Public.
Immunity	-	Exemption conferred by any law from a general rule.
Ombudsman	-	Parliamentary Officer
Mandate	-	a command

10.11 ANSWERS FOR CHECK YOUR PROGRESS QUESTIONS

For Question No.1	...	Refer Section No. **10.3**
Question No.2	...	Refer Section No. **10.1**
Question No.3	...	Refer Section No. **10.1**
Question No.4	...	Refer Section No. **10.7.3**
Question No.5	...	Refer Section No. **10.8**

10.12 MODEL QUESTIONS

A. Short answer questions

1. Lokpal - write short notes.
2. Public Corporations – write short notes.
3. Government Companies – Explain.

B. Long answer questions

1. What are the different types of Public Corporations? How they are controlled?
2. Explain the reasons for the growth of Public Corporations. Why is it said that it is a useful device for performing its welfare and development functions?
3. Explain the role of Ombudsman in remedying citizens grievances arising out of mal administration.

MODEL QUESTION PAPER

(Space for Hints)

Time : Three hours **Maximum : 100 marks**

PART A - (5 x 15 = 75 marks)

Answer any FIVE questions

Each question carries 15 marks

1. Define rule of law. Refer to recent developments.
2. Explain the rule against departmental bias. Refer to cases.
3. What do you know about Droit administratiff of France? What are its uses?
4. Write an essay on administrative discretion.
5. What are the judicial remedies open to an individual aggrieved by an administrative action?
6. What is the significance of classification of administrative function? Explain how an administrative function may be distinguished from Quasi - Judicial function.
7. What are the characteristic features of a Tribunal?

PART B - (5 x 5 = 25 marks)

Answer any FIVE questions

Each question carries 5 marks

Write short notes on :

(a) Audi Alterm Partem.

(b) Ombudsman.

(c) Administrative disection.

(d) Resjudicate in Writ Proceedings.

(e) Relation between separation of powers and administrative law.

(f) Contractual liability of the state.

(g) Subjective satisfaction

(h) Ultravirus of the powers of the administrative authority.